THE THEORY OF THE STATE.

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PREFACE.

In submitting to the American Philosophical Society the following essay upon the Theory of the State, I desire to say a word in explanation of the unusual number of quotations used, and the consequent voluminousness of the notes. This course was suggested to me by the example of Roscher in his *Political Economy*, and has been adopted as apparently the best method of considering the theory of the State, at once historically and upon principle, as required by the offer of the Society. For in this way only has it been practicable for the author to develop his own theory briefly and consecutively, and at the same time to review other theories.

I also desire to say a word in apology for, or rather in vindication of, the somewhat free and plain-spoken criticisms of the theories of others that I have found it necessary to make. In this I have followed the example of the older writers on the theory of the State from Aristotle down; whose custom (to use a familiar phrase) has always been to handle the theories of other writers without gloves, and by whom similar treatment has never been regarded as a just subject of complaint. I admit, however, that the practice is, at the present day, open to some objections. For, as will be seen, the theories of modern publicists are of a delicate and somewhat artificial structure, little suited to stand the rough handling of logic, and, in fact, existing mainly by mutual comity. This is especially true in England, and in this country, where jurists and publicists have, for over half a century, been absolutely dominated by Austin's false and pernicious theory, and where, consequently, that theory must necessarily be attacked in order to gain even a hearing.

And especially I desire that these criticisms may not be regarded as evidence of any malice or ill-feeling on my part. On the contrary, the two authors that I criticise most severely, Hobbes and Austin, I have ever regarded with the most profound admiration; and their works, though false in conclusions, yet seem to me, on account of their logical method, and the profound and accurate analytical power displayed in them, beyond comparison, the most valuable contributions made to political science in modern times; and I freely confess that from them I have learned more than from all other writers, Aristotle excepted.

I may say, therefore, in the language of the old adage (which I adopt as the motto of my work): "*Amicus Plato, amicus Socrates, sed magis amica Veritas.*"

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INTRODUCTION.

§ 1. *The Theory of the State Defined and its Scope Determined.*

The theory of the State, in the proper and most comprehensive sense of the term, would seem to involve the consideration of all matters affecting the political and social life of man, and, to speak accurately, should, therefore, be regarded as coextensive with the whole of political science. It will, however, be more convenient in the present state of philosophy, to regard it as confined to the consideration of certain political problems, that are broadly distinguished from the rest of political science by their fundamental character, and by the fact that they stand, as it were, at the threshold of the subject and imperatively demand solution as a condition even of entrance into it.

These are to determine, (1) the nature of the State, (2) its functions, (3) its rights, or rightful powers, and (4) the principles that should govern its political organization.

In addition to these subjects—which the German publicists include under the head of Public Right (Staatsrecht, *Jus Publicum*), regarding it as a department of Jurisprudence or Natural Right—they include in the theory of the State another subject, which they call *Politik* (politique). This term is the equivalent of the English word Politics: but, as with us, the term is used, after Aristotle, to denote the whole of political science, it will be better to translate the German word by the term Policy. The nature of this subject, and its relation to the theory of the State, will be understood by reference to the passages cited in the note (*a*) *.

In the following exposition of the theory of the State, it will be found most convenient, in general, to consider the historical aspect of the subject in connection with the several topics as they arise, or, in the sequel, after the exposition of the theory has been completed. But, in exception to this general course, it will be found convenient and even necessary to consider in advance, by way of introduction, certain theories, now generally prevailing, by which our investigations may otherwise be embarrassed.

§ 2. *Of Certain Current Political Theories.*

There are certain traits common to modern political writers—and from which hardly any are exempt—that have profoundly, and, I think, deleteriously, influenced political theory. These are *bias*, or prejudice, and *illogicalness*, or disregard of logic—two infirmities very closely united. For—as observed by logicians—if the mind be wholly unbiased, it spontaneously observes the true method of reasoning. But where bias or prejudice intervenes, there is no fallacy so absurd that it may not entrap

* All notes indicated by letters will be found at the end of Introduction. Those occurring in a Chapter at the end of the Chapter.

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the acutest intellect. For prejudice—as expressed in the popular proverb: "The wish is father to the thought"—is the native and congenial soil of logical fallacy; against which, in the absence of this powerful and malignant influence, nature itself, without special training, is in general a sufficient protection. Of the truth of this observation, the writings even of the most distinguished political theorists—such, for instance, as Hobbes, Kant, Austin, not to speak of lesser men—furnish, as will be seen, numerous and striking illustrations. So that in place of the trivial and often ridiculous examples used by logical writers to illustrate the different kinds of fallacies—and which, perhaps, have greatly contributed to bring logic into the contempt and consequent disuse into which it has fallen in modern times (*b*)—there might be readily collected from the most distinguished sources, examples of all of them, that have proved their efficiency by deceiving, not only the less intelligent reading public, but also the great philosophers that invented them.

Hence, it has resulted that the political theories current in modern times are in general mere expressions of popular sentiment prevailing at the time of their inception, modified more or less by the idiosyncrasies of their respective authors, and by subsequent changes of popular opinion; and the origin or original genesis of any given theory is, therefore, generally to be sought, not in the formal reasoning adduced in its support, but in the events and character of the period in which it originated and in the character, mental and moral, or as it may be called, the personal equation of its author. Hence, also, it will be found, that the reasoning of political writers is, in general, merely polemical, or, in other words, designed, not to direct the author's investigations, or to test the correctness of his conclusions, but to establish some preconceived opinion, consciously or unconsciously, imposed upon him by his environment, or by authority. For, in modern times, on nearly every great political question, men take sides and range themselves, or are ranged by fortune, into parties, and henceforth devote themselves, not to investigating, but to establishing the dogmas to which they have become fortuitously attached. Hence, it may be said, without much exaggeration, that, with regard to political and social problems, men generally have ceased to be reasoning, and become mere arguing creatures; and that there is hardly a writer on the theory of the State, since Aristotle, that has approached the subject in the true scientific spirit, without bias, and with entire indifference as to the conclusions to which his investigations might lead him. (*c*)

From this infirmity, almost universal, of political writers there have resulted certain political theories, which, though wholly unverified, have come to be almost universally received, and are so intrenched in the sentiments and prejudices of the people, or classes of the people, as almost to preclude the possibility of a fair and unbiased consideration of the subject, of politics.

This opinion will doubtless be "*caviare* to the general;" and for most readers it will be hard even to conceive the possibility of its being true.

But the most incredulous may be readily convinced of the justice of the opinion, if he will follow us in a critical examination of some of the theories referred to and of the arguments adduced in their support.

Among these the most conspicuous is the doctrine of sovereignty as generally received in modern times, and to this we will first devote our attention. This doctrine will be found to rest for its plausibility upon certain purely logical fallacies ; and it will, therefore, require no special knowledge of political science to investigate its claims to credibility. On this account, and because it stands in the way of an intelligent investigation of our subject, the Introduction presents the most appropriate place for its consideration.

§ 3. *The Doctrine of Absolute Sovereignty.* (*d*)

The doctrine of absolute sovereignty so universally asserted and apparently believed, would seem to consist of a single proposition, and the several forms in which it is asserted, to be merely unessential variations of the same doctrine. But this is far from being the case ; for the term *sovereign*, on which the meaning of the term *sovereignty* depends, has several essentially distinct meanings, and to each of these there corresponds a distinct and independent theory. (*e*)

Hence, the so-called doctrine of sovereignty consists in reality of several theories that must be distinguished from each other, and which, it will be found, are not only essentially different but mutually inconsistent.

(1) Originally the term sovereign denoted merely a monarch or single ruler ; and the corresponding doctrine of sovereignty simply asserted the absolute or unlimited power of the monarch, or, as more usually expressed, the Divine Right of Kings. In this, the original and proper sense of the term, sovereignty—being the power of a single man—is *ex vi termini*, indivisible. But that it is absolute is a proposition asserted only by extreme royalists, who may now be regarded as practically extinct.

(2) But afterwards, with the progress of constitutional government in Europe, the term sovereign came to denote not merely a monarch but the government or political organization of the State, whether consisting in an assembly or of several departments ; and the doctrine of sovereignty thus assumed the form of asserting the unlimited power of the government in its corporate capacity. But obviously the term sovereign is here used in a secondary and improper sense, essentially distinct from its original signification ; for the government thus regarded is a body politic or corporation, which is rightly defined as a fictitious or imaginary person ; and the power of this fictitious sovereign is equally fictitious or imaginary. For human power can exist only in actual human beings ; and though for convenience we may speak of the power of the government, as of that of any other corporation, yet the expression is always to be understood as really denoting the concurrent powers of certain individuals in the government. Thus, taking for illustration the case of a simple sovereign assembly, and regarding this as *the sovereign*, when we

speak of its power, we mean nothing more than the united powers of a concurring majority. And hence, instead of regarding as sovereign the fictitious entity that we are accustomed to regard as such, we might with greater propriety say that the actual sovereign is the majority that acts, and that, with every change in the constitution of such majority, we have a different sovereign. (*f*)

Hence, it is easy to perceive that the doctrine of corporate sovereignty—which is the form in which the doctrine of sovereignty is now most usually asserted—is inconsistent with the original doctrine. For the latter assumes the existence of a single supreme ruler or sovereign, whose power is certainly indivisible, and may be absolute; but the latter rests upon the assumption that there are several officers or rulers, in each of whom political power is vested, and, hence, that the sovereign powers of the government are not only divisible, but actually divided; and consequently that the power of each is limited by the condition that others shall concur in its exercise. Accordingly all the great constitutional struggles that have occurred in history have been in effect contests between the doctrine of *personal*, and that of *corporate* sovereignty, and the triumph of the latter is justly regarded as having finally overthrown the former.

(3) But latterly the doctrine of corporate sovereignty has been asserted in another form that bids fair in this country and in others inclining to republicanism to supplant the doctrine as originally expressed. This, which may be called the doctrine of the sovereignty of the State or of the people, results from the distinction, now generally recognized, between the State and the government, and asserts that the sovereignty is vested, not in the latter, but in the former.

But this doctrine must be clearly distinguished from another that passes by the same name. In all liberal governments either all, or a large proportion of the adult male citizens participate in electing representatives. And in this country the electors are also vested by law with the power of changing the constitution of the government, either by constitutional conventions or otherwise. Hence, when we speak of the sovereignty of the people, reference is generally made to the electors only and not to the people generally, or the State as distinguished from the government or political organization of the State. But obviously the electors are part of the political organization or government, and hence, the doctrine of sovereignty of the people, in this sense, does not differ essentially from the doctrine of corporate sovereignty, as stated in the preceding paragraph.

Hence, to avoid this ambiguity, the expression, "the sovereignty of the people," should be disused, and instead of it we should speak only of the "sovereignty of the State," by which is meant the sovereignty of the whole people, or the State as distinguished from the political organization of the State or government.

Of the two forms of the doctrine of sovereignty last adverted to—namely, the doctrine of corporate sovereignty and that of the sovereignty of the

State—it will be observed that each is at once more liberal and less definite than its predecessor, and that the last is altogether without significance, except in so far as it repudiates the notion of unlimited political power either in a single ruler or in the government; and thus, while preserving the name, it in fact altogether denies the doctrine of absolute sovereignty. It would, therefore, be altogether unobjectionable, were it not that indefinite theories that to wise men mean nothing, to the multitude mean anything that passion and prejudice may suggest; and hence, that such theories constitute the most fruitful cause of political heresies and revolutions.

(4) Finally, under the influence of the more enlightened spirit, and the more profound realization of the principle of liberty and of human rights that characterizes our modern civilization, the term sovereign has received a still wider extension of meaning, and is now often used to denote mere abstractions, as when we speak of the sovereignty of Reason, or of Justice, or Right, or of Public Opinion. Accordingly the doctrine of sovereignty has undergone a still further and more satisfactory evolution into the doctrine of the sovereignty or supremacy of the law or of right. But obviously this use of the term is purely metaphorical, and merely expresses the notion that justice or right is at once the paramount standard of the rectitude of human conduct and the source of all rights, public and private. This is in effect the doctrine expounded in this work, and to render the expression of it entirely unobjectionable, it is only necessary that the name as well as the substance of the doctrine of sovereignty be abandoned. (*g*)

(5) It is also to be observed that in each of the above expressions of the doctrine of sovereignty—with the exception of the last, which cannot be regarded as such—there is another ambiguous term which has been the source of much confused political thinking and serious political error. This is the term "power," which is habitually used to denote, not merely *actual* power or might, but also *rightful* power, or power that the government or individual ought to have, or, in other words, right. Hence, accordingly as we use the term power, each of the propositions stated is susceptible of two constructions; and thus, under the apparently single proposition that the sovereign power is unlimited, we have included six essentially different doctrines, that to avoid confusion ought to be, but which in general are not, distinguished by political writers.

And to add to this confusion, there is in the brief proposition referred to also another ambiguous term, namely, the term "*unlimited*"—a term altogether without meaning, until we determine the nature of the limit referred to, which may be either mere force, or law in the sense of *lex*, or law in the sense of *jus*, or theoretical right. And thus each of the six propositions into which, as we have seen, the doctrine resolves itself, may branch out into several others.

§ 4. *General Observations Upon the Doctrine of Sovereignty.*

Of the several forms of the doctrine of sovereignty above enumerated —namely, the doctrine of *Personal* sovereignty, of *Corporate* sovereignty, of the sovereignty of the State, and of the sovereignty of Right, or of the Law—the first—now happily obsolete—is the only one that has any definite significance; for in this form of the doctrine, the *sovereign* referred to is an actual person; whose power is necessarily indivisible and may be despotic. But in the second form of the doctrine—namely, that of corporate sovereignty—the *sovereign* referred to is a body politic or corporation, a purely fictitious person, whose supposed power is equally fictitious. That the fictitious and imaginary power of this fictitious and imaginary sovereign is unlimited and indivisible is a proposition without significance and is to be regarded as a mere verbal trick or contrivance to conceal the actual fact that, in all governments of more than one, the supreme political powers are in all cases divided among several officers or departments, and that the power of each officer or department is necessarily limited by those of the others; and hence, that in all such governments the proposition that the sovereign power is necessarily unlimited and indivisible, is, in fact, untrue. The doctrine of *corporate* sovereignty must, therefore, be regarded as in effect a denial of the true form of the theory; which is that of *personal* sovereignty. *A fortiori* are these observations true of the doctrine of the sovereignty of the State—where the sovereign is conceived to be the unorganized mass of the people, of all ages, sexes and degrees of mental capacity, without political power, or capacity of exercising it—and also of the doctrine of the sovereignty of Right or Law; where the imagined sovereign is a mere abstraction.

These obvious considerations are sufficient of themselves to dispose of the doctrine of absolute sovereignty, which—except in its now happily obsolete form as asserting the divine right of kings—is altogether destitute of definite signification, or, in other words, using the term in its original sense, is merely *nonsense.*(*h*) This is strikingly illustrated by the arguments that have been adduced in its support; which, for the purpose of further illustrating our thesis, we will next consider, commencing with the celebrated argument of Hobbes.

§ 5. *Hobbes' Argument.*

Hobbes clearly perceives the nature of the fundamental problem of political science; which is to determine, not the *actual*, but the *rightful* power of the government, or, in other words, the power with which the government *ought* to be vested. As stated by him, the question to be considered is: "What are the 'rights' and 'just power' or 'authority' of a sovereign?"* And accordingly his conclusion—which is that the "rights" or "just power" of the sovereign over the lives and fortunes of the subject is unlimited, and that there is a corresponding *duty* on the

* *Leviathan*, Introduction.

part of the subject to obey—in words, precisely corresponds to the question thus stated.

But to reach this conclusion, Hobbes is compelled to assume the existence of an imaginary contract or covenant between the individual members of the State—not with the sovereign, but with each other,—by which this unlimited right or power is conferred upon him; which is a manifest *petitio principii*, of the most glaring kind, belonging to the class of what are called *legal* fictions; which are erroneously supposed to be peculiar to lawyers—but are also used, or rather misused, by philosophers. These consist in the conscious assumption as true of propositions known to be false—as for instance, in the legal maxim that the husband and wife constitute one person, or in the essentially similar proposition involved in the notion of a corporation or body politic, that the several members of a society, as for instance the State, constitute a person. (*i*)

But the assumption of a social contract is not, of itself, sufficient to establish the desired conclusion. For it may be reasoned that certain conditions are necessarily implied in such a contract—as, for instance, that performance by the sovereign of his functions is a condition of the contract; or even that the power of the sovereign might be divested in the same way it was conferred; or that other consequences might follow such as are in fact drawn by Locke, Rousseau and others. Hence, it was assumed by Hobbes that the supposed contract of the individual members of the State is unconditional, that it is irrevocable, and finally—to cover all points—that its effect has been to transfer to the sovereign, not only "all their powers and strength," but even their wills, so as "to reduce all their wills, by plurality of voices, to one will," and thus to create, not merely "a consent or concord," but "a real unity of them all in one and the same person."* From which he concludes, that "every subject is . . . . author of all the actions and judgments of the sovereign."† And "that nothing that the sovereign representative can do a subject, on what pretense whatever, can properly be called injustice, or injury; because every subject is author of every act the sovereign doth." Hence the killing of Uriah by David "was not an injury to Uriah, ... because the right to do what he pleased was given him by Uriah himself;"‡ who, being the author of the act, in fact—upon the principle, *qui facit per alium, facit per se*—committed suicide.

This extravagant conception of Hobbes is revived in modern times by Mr. Bluntschli and others; the fundamental principle of whose doctrine is that the State is an "*organized being*," or an "*organism*," having a soul and body, a conscience and active organs, and also a will which is different from the individual wills of all individuals and different from the sum of them, and even that it is of the masculine gender; in fine, that it is a "moral organized masculine personality, or, more shortly . . . . the political original national person of a definite country" (Bluntschli's *Theory of the State*, Bk. i, Ch. i). Or, as expressed by an-

* *Leviathan*, 84. † *Id.*, 86. ‡ *Id.*, 101, 102.

other: It is "an organism," "a conscious organism," "a moral organism," "a moral personality" (Mulford's *The Nation*, Ch. i). Obviously all this is merely metaphor, and expresses nothing more than the admitted fiction involved in the notion of a corporation in regarding it as a fictitious or ideal person. There is, indeed, a very close analogy between States or other corporations and natural persons; but it is very unsafe to reason from this analogy; and to neglect to observe the essential difference between the two notions may involve the most serious errors. An instance of a great judge being misled by it is furnished by the decision of Chief Justice Marshal in the celebrated Dartmouth College case, 4 *Wheat.*, 508.

In that case the principle was asserted that a charter to a corporation is a contract, which, under the constitutional provisions forbidding the enactment of laws impairing the obligation of contracts, could not be altered by the State; and the principle was held to apply to the charter of the plaintiff—an eleemosynary corporation. But it is clear that, strictly speaking, a corporation—which is a purely fictitious or imaginary being—cannot itself have any rights, and that what we call the rights of a corporation are, in fact, the rights of its stockholders, creditors or other individuals beneficially interested; and hence that the constitutional provision can have no application, if there are no such persons—as was in fact the case before the court. Hence, in that case—as in all others where property has no other owner—the beneficial interest in the property of the corporation was in the State, and could deal with it as it pleased. Or, to state the proposition more generally, all property held for charitable purposes—at least, after the death of the donors—belongs to the State, and may be disposed of by it according to its own views of what is right and proper.

A similar question was presented by the proposed legislation in England for the disposition of the property of the old trade companies of London; which survived only for the purpose of holding the property vested in them several hundred years ago for charitable purposes. This legislation was vehemently opposed as an invasion of private rights; but it is very evident, the funds being devoted to general charity, that only the public had an interest in it.

Here again, therefore, another example of *petitio principii* is presented, consisting in the monstrous assumption that not only the rights of the subjects, but even their wills, and their persons are, in some mysterious way, transferred to, and incorporated in the fictitious Leviathan, and that there is thus effected "a real unity of them all in one and the same person;" who is thus "enabled to perform the wills of them all" * —a doctrine certainly as extravagant as that of the actual conversion of bread and wine into the body and blood of Christ, which Hobbes is never tired of ridiculing.†

But independently of these fallacies in the argument—which, were it

* *Leviathan*, 84.

† *Id.*, 44, 276, 294.

not for their actual influence on political speculation, would be too transparent to notice—the conclusion itself presents a peculiarly artful and effective example of the fallacy of *irrelevant conclusion* or *ignoratio elenchi.* For, while it seems to respond to the problem propounded, it does not really do so, but, when construed according to Hobbes' own definitions of the terms used, assumes a very different meaning, or rather becomes devoid of all material significance. For, as defined by Hobbes, *right* signifies merely the absence of restraint imposed by law (*lex*).* Hence the proposition, that the power of the sovereign, is not limited by law, regarded as the expressed will of the sovereign, simply asserts the truism, equally applicable to the sovereign and all others, that a man's power cannot be said to be limited by his own will. So with regard to the term *just,* "the definition of injustice," he says, "is no other than the not performance of contract, and whatever is not unjust, is just."† Hence the conclusion merely asserts that the power of the sovereign is not limited by contract. Which, according to Hobbes' theory, is very true; for he is not party to the social contract, and is not bound by any other for want of a superior power to enforce it.‡

So also, with regard to the duty of obedience in the subject, apparently asserted—this, according to Hobbes' definition, means nothing more than the fear of evil consequences to be inflicted by the sovereign for disobedience, and *ex vi termini* must be admitted to exist precisely to the extent that there is ground for such fear.

Hence, translated into plain English, the conclusion asserted is nothing more than that the so-called right of the sovereign is an unbridled or lawless power, to which prudence demands of the subject that he should submit in order to avoid worse consequences. This is an altogether different proposition from that which the author undertook to establish, and which he apparently asserts, viz., that the *right* of a sovereign over the fortunes and the persons of his subjects, and the corresponding duty of the subject to obey, is unlimited; but nevertheless the conclusion is habitually used by him and others, as though equivalent to that proposition.

In fine, the theory of Hobbes rests wholly upon the assumption that the will of the government is the paramount moral standard by which justice and injustice, and right and wrong, generally, are to be determined; and from this it follows inevitably that, in the proper sense of the term, neither the sovereign, nor—in relation to the sovereign—the subject can have any rights, or be subject to any duties or obligations. (*j*)

§ 6. *Kant's Argument.*

Kant, like Hobbes, asserts the absolute or unlimited power of the sovereign over his subjects; and, like him, is guilty of a manifest *petitio principii* in his reasoning, which is as follows: It is "the right of every

* Right is that liberty which the law leaveth us (*De Corpore Politico,* Bk. ii, Ch. x, § 3).
† *Lev.,* p. 72. ‡ *Lev.,* 85.

citizen to have to obey no other law than that to which he has given his consent or approval."* But the legislative power is to be regarded as "the united will of the people,"† and as necessarily including as such the will of every citizen. Hence, every law is to be regarded as an expression, not only of the will of the government, but of every individual in the State; and hence, "resistance on the part of the people of the State to the supreme legislative power of the State is in no case legitimate; for it is only by submission to the universal legislative will that a condition of law and order is possible. Hence, there is no right of sedition, and still less of rebellion, belonging to the people."‡ "The will of the people is naturally un-unified, and consequently it is lawless; and its unconditional subjection under a *sovereign* will, uniting all particular wills by one law, is a fact which can only originate in the institution of a supreme power and thus is public right founded. Hence, to allow a right of resistance to this sovereignty, and to limit its supreme power, is a *contradiction;* for in that case it would not be the supreme legal power if it might be resisted, nor could it primarily determine what shall be publicly right or not. This principle is involved *à priori* in the idea of a political constitution generally, as the conception of the practical Reason."§

This, as will be seen, is precisely the argument of Hobbes, with its native enormities draped under a cloud of words. Its whole validity rests upon the manifest fiction that *the will of the State* is the *united will* of all the people; to which it may be answered that what is called "the will of the State," is merely the will of the individuals who control the State, and that the will of these rulers does not necessarily, or even generally, concur with the wills of the citizens, even where these happen to concur. Furthermore, it is manifest that the term will is purely relative, and implies some actual creature in whom it exists. Hence, the State, properly speaking, cannot be said to have a will; and when we speak of the will of the State, or of the government, or of the legislature, we use the term in a figurative sense, based upon the conception of the State as a body politic, or in other words as a fictitious person. (*k*)

§ 7. *Huxley's Argument.*

Another argument I find attributed to Professor Huxley in a collection of essays lately published, under the singularly inappropriate title of "A Plea for Liberty." But whether he is in fact responsible for it, or for the use made of it by the author, I do not know. It occurs in the essay entitled "The Limits of Liberty," by Mr. Donisthorpe, and is as follows:

"The power of the State may be defined as the resultant of all the social forces operating within a definite area. 'It follows,' says Professor Huxley, *with characteristic logical thoroughness*, 'that no limit is, or can be theoretically set to State interference!'" (*l*)

* *Philosophy of Law*, p. 167.
† *Id.*, p. 166. ‡ *Id.*, p. 176. § *Id.*, p. 258.

It is, however, obvious that the author of this argument, whether Prof. Huxley or another, fails to distinguish between the two senses of the term *power*, to which we have alluded, namely, that of *actual* power or might and that of *jural* power, or right. In the premises of the argument it is used in the former sense, and in the conclusion in the latter—thus presenting—instead of a "characteristic thoroughness of logic"—a striking example of that most common and most destructive of all fallacies, an ambiguous middle.

But independently of this, the argument is obviously a mere rhetorical artifice; for the term, forces, in its proper sense, denotes merely physical forces, that operate under fixed laws, from which, from given data, the resultant can be mathematically determined. But when we speak of social or moral forces, or of the resultant of such forces, the term is used in a sense purely metaphorical. Hence, the proposition of Prof. Huxley is to be regarded as only figuratively true, and must be translated into plain English before it can be logically serviceable. But thus translated, no definite meaning can be assigned to it.

The attempt is however made by Mr. Donisthorpe to render the proposition more definite by defining the sovereign as consisting of what he calls "the effective majority" or "*force majeure.*" But even with this explanation the doctrine still remains indefinite.

What is the effective majority, or superior force—*force majeure*—referred to? To this two answers are given, one by the author cited, and the other by a writer to whom we will presently refer; and accordingly as we take the one, or the other, the doctrine will assume an essentially different form.

(1) According to Mr. Donisthorpe—as will be seen by reference to the passage cited in the note—this *force majeure* or superior force is necessarily vested, not in the unorganized State, but in the government, and "*the effective majority*" is but another name for the individuals who control the government; and thus apparently we arrive again at the doctrine of governmental absolutism, or of the unlimited power of the government, as asserted by Hobbes. But this, though supposed by the author to be the case, is not so. For, as we have seen, Hobbes' doctrine is that the "rights," or "just authority," of the government are unlimited; whereas the present writer unequivocally defines his proposition as asserting only that the *actual* power or force of the government is unlimited—a proposition essentially different, and obviously false. For not only do governments undoubtedly differ in actual power, but the power of the strongest is constantly and successfully resisted or evaded, and a limit thus set to State interference otherwise than "by the simple process of exploding the State." All that can be claimed for Leviathan is that he is bigger and stronger than the individual, and therefore in general able to overcome his resistance; but clearly omnipotence is not one of his attributes; nor will any amount of assertion make him stronger than he is.

(2) The other form of the doctrine of *force majeure* proceeds upon pre-

cisely the same argument; but it is a striking testimony to the lack of definite significance in Prof. Huxley's proposition, (or, rather, I should say, in the proposition attributed to him), that an essentially different conclusion is reached. According to this doctrine—as stated by a late writer*—the sovereign is not the government, but something outside of the government.

"The statement," he says, "that municipal law is 'prescribed by the supreme power in the State,' is false and misleading, unless by the 'supreme power in the State,' is meant the aggregate of all the social forces, both material and spiritual, which go to make up our civilization."

The "supreme power in the State," or the sovereign, is therefore this "aggregate of all the social forces," or, as elsewhere expressed, this "resultant of social forces." But this is obviously a merely figurative expression, and renders further definition of the sovereign necessary. This is effected by the more definite proposition that the supreme power in the State, or the sovereign, is "that aggregation of individuals which has the actual ability to enforce obedience"—it being added by way of explanation that all political power rests merely "upon the possession by the few of the superior strength, both moral and material."

But this again is a very indefinite notion; for "the aggregation of individuals which has the actual power" is not the majority of the whole, or even the majority of the dominant party, but the political managers of the latter; and hence we must have a new sovereign, not only with every election, where the majority changes, but with every change in the managers of the prevailing party.

(3) The theory of Mr. Tiedeman and that of Mr. Donisthorpe, though apparently similar, and therefore liable to be confounded, are, in fact, essentially different. The latter regards the government as the sovereign, and the sovereignty as vested in it. The former asserts that the sovereign is something outside of the government; which he describes as the "aggregation of individuals, which has the actual ability to enforce obedience;" or, as elsewhere expressed, "those who possess the political power." The former assumes that the power of the government is necessarily irresistible, and that when it ceases to be so, it is no longer a government; the latter that the government has, in fact, no independent power, but merely registers the decrees of the vague and shadowy sovereign existing outside of it. Hence, in Mr. Tiedeman's view, the law consists of the commands, not of the government, but of "those who (for the time being) possess the political power;" and "the commands of these few constitute the law, whatever be their superior viciousness or iniquity." Or, as the doctrine is expressed by a writer in a late number of the *American Law Review:* The law is simply "a system of rules agreed to by *the dominant element* in the State or community," and "government, merely a contrivance for the enunciation and enforcement of these rules."

This theory, though perhaps when taken literally, more extravagant than any of the others, has at least the merit of recognizing the great

*Tiedeman, *The Unwritten Constitution of the United States.*

truth that there is, in fact, a power outside of the government and paramount to it, of which the government itself is mainly an instrumentality. The defects of the theory are: (1) that it regards merely the actual power of the government and does not consider the more important question of its rightful power, or right; and (2) that it fails to identify the nature of this paramount power by which the government is controlled.

With regard to the extent of the actual power of the government, all that can be said is that it varies infinitely in different times and countries, and hence, that no theory with reference to it is possible. It may, however, be asserted that the power of the government is, in no case, unlimited;—which is but to say, that the omnipotence of human power is inconceivable. And it may be further asserted that there is always a power outside of it that is in general and in the long run, superior to it. This consists, it is sometimes said, in public opinion; but the expression is an unfortunate one, including not only the settled concurring convictions of men with reference to fundamental questions, but also transient popular opinion, which is altogether unreliable, and which in fact is often disregarded by the government. We must regard the expression, therefore, as referring only to opinion that is permanent, that relates to matters of right and wrong, and in which all or nearly all concur; which corresponds almost precisely to the Greek term *nomos*. In this sense, all governments are, in the long run, to a large extent, and in civilized countries almost entirely, governed by public opinion; and in this we have the actual power to which doubtless Prof. Tiedeman more or less consciously refers. This concurrent opinion, however, consists in an agreement, not of the wills, but of the consciences of the people; and it simply affirms not what is, but what ought to be, and is, therefore, nothing more nor less than the general conscience or positive morality of the community. That it is always correct cannot be affirmed, but that it is so in the main is beyond question; and it is also certain—as will be shown hereafter—that it is the only admissible practical standard by which questions of general concern are to be immediately determined. We have here, therefore, not merely an actual power, by which governments are in fact largely controlled, but also the rightful power by which they ought to be controlled; and in which, in fact, the rights of individuals and of governments find their source. And thus again we arrive at the so-called doctrine of sovereignty which asserts that the law or justice is the true sovereign. And this we may conceive is the unconscious but real theory intended by those who assert the fiction of a "general will," vested in the government, representing the particular wills of all the individuals in the community.*

* The matter in this and the following section has been collected from various sources, some of which it has been impracticable to note. In addition to the sources specified in the notes, I have in this chapter, and also in the Introduction, drawn largely upon Mr. Smith's *Elements of Right and of the Law* (Callaghan & Co., Chicago), and a monograph of the same author entitled *A Critical History of Modern English Jurisprudence.*

§ 8. *Of Austin's Argument, and of His Theory Generally.*

The theory of Austin is so coherent and closely knit together that his doctrine of sovereignty can only be considered in connection with his general theory; which, therefore, must be first considered.

(1) The theory of Austin is in fact wholly based upon the ambiguity of the term *law;* which is defined by him as though equivalent to the Latin *lex,* but habitually used as though including the whole law, or *jus.* Thus —taking for illustration the famous position of Austin, that judicial decisions are in fact commands or expressions of the will of the State, and therefore in nowise different in essential nature from laws or statutes—it is obvious that the conclusion is deduced by an apparent syllogism, of which the major premise is the proposition that all *law* is an expression of the will of the State or government, and the minor, that judicial decisions constitute part of the *law;* from which—assuming that the term *law* be used in the same sense in both propositions—the conclusion must necessarily follow. But, in fact, in the major premise, it is used in the sense of *lex,* and in the minor, in that of *jus.*

The same fallacy is also illustrated by the equally famous position of the same writer, that custom does not constitute part of the law—the argument being as follows: (1) As before: All law (*lex*) is an expression of the will of the State. (2) Custom is not an expression of the will of the State. *Ergo,* (3) Custom is not part of the law (*jus*).

The theory of Austin also furnishes us with a beautiful illustration of the fallacy of *petitio principii.* For the theory is wholly deduced from the definition of the law as being merely an expression of the will of the sovereign, or the Supreme Government, and is therefore in effect assumed in the definition; while the definition itself was taken, as it were by accident, from Blackstone, without proof, or attempted proof of its correctness, and as though self-evident. (*m*)

The theory also presents several striking and important illustrations of the fallacy of irrelevant conclusion or *ignoratio elenchi*—the most formidable form of which is to use an ambiguous conclusion proved true in one sense as though true in all senses. Of this the most important and conspicuous examples are furnished by the reasoning of Austin upon the two important subjects of justice, or rights, and of sovereignty—which will be considered in the order named.

(2) In the vocabulary of the Austinians, a right is defined as being a mere *legal* power, or, in other words, a power over others, vested in any one by the expressed will of the government; and rights, therefore, in this sense of the term, are mere creatures of that will. Accordingly, whatever power be conferred by the government upon any one—though it be in violation of every principle of justice and morality, and even of mercy or decency—it constitutes a right; and, on the other hand, no claim that one man may have upon another, however just, can constitute

a right, unless the government has signified its will that it should be such. But the term *a right* universally carries with it, as part of its essential connotation, the notion of *rightness*, and, consequently, *ex vi termini*, it is impossible to conceive of a right that is not just, or rightful; and hence, Austin was compelled to advance to the position that, "in truth, law (*i. e.*, the expressed will of the government), is itself the standard of justice."* This view he based on the proposition that the term, "*just, or unjust, justice, or injustice*, is a term of relative and varying import"—denoting merely conformity, or non-conformity, to some "standard of comparison," referred to by the speaker. This standard may be either (1) the will of God, as evidenced by utility, or (2) positive morality, or (3) the will of the government; and, accordingly as the one or the other of these standards is referred to, the term has an essentially different meaning. Hence, it may be said, with equal propriety, that Socrates was poisoned, and Christ crucified, either justly, or unjustly; or that it is either *just* or *unjust* for one to refuse to pay an honest debt, or to return a deposit, where the action of the creditor or owner is barred by the Statute of Limitations. Or we may, in one sense of the term, approve as just the fate of the gladiator "butchered to make a Roman holiday," or the spectacle of Christians converted by Nero by way of amusement into animated torches, or of the crazy act of Caligula in making his horse a consul, or the marriage of Elagabulus to his catamite.

Of the three standards referred to, Austin holds the first, *i. e.*, utility, "as an index to the Divine Will, to be obviously insufficient;" the second—*positive morality*—as mere opinion and therefore of no authority, and, consequently, the third—the will of the government—as practically the only one admissible. Accordingly, it is asserted, not only by himself, but by the modern English jurists generally, that in jurisprudence, or the law, the last is the standard, and the only standard referred to; that the term *rights*, is always used in this sense, and all other senses of the term are disregarded. To this, were we considering the theory generally, objection might be made on the score that it is an altogether novel sense of the term *right*, and one inconsistent with its proper and generally accepted sense; and that in thus using it, it is almost impossible either for the speaker or the hearers to escape from the original connotation of the term. And even the suspicion might be suggested that the term is in fact used on this account, with a view of covering the innate and essential deformity of the Austinian theory with the cloak of its venerable name. But this, though in my opinion true, is immaterial to our present subject, which is simply to expose the logical fallacy, and for this purpose it will be sufficient to show—as can be very readily done—that the term is not used consistently by the Austinian jurists in the sense in which it is defined.

The principle asserted by Austin is that *justice*, in the sense he uses the

* *Jur.*, 223.

term, denotes merely conformity to the will of the government, and that consequently *rights* are mere *legal* or *statutory* powers, and therefore mere creatures of the legislative will; and from this it logically follows that, *in this sense of the terms*, there can be no such things as *natural* rights, or *natural* justice, or right. To this—except as a matter of taste—provided the terms be understood in the sense defined—no objection need be urged; but thus construed, both propositions are without significance; for the one simply asserts the identical proposition that natural rights, or rights existing independently of legislation, are not rights created by law, in the sense of legislation; and the other, the natural *justice* or *right*, which, *ex vi termini*, does not refer to the will of the government as the paramount standard, is not necessarily *justice* or *right* as determined by that standard. The conclusions reached, therefore, have no bearing upon the real question involved; which is: Whether there is, or is not a standard of justice or morality paramount to the will of the government? or, in other words: Whether there are in fact, such things as natural rights, and natural right or justice? Nor is there anything anywhere contained in the Austinian theory that throws any light on this great and fundamental question. Yet the conclusion thus reached by Austin—which, when construed according to his definitions, is a mere truism—is habitually understood and used by his followers—as it was by himself—as though establishing the negative of the great question of the existence or non-existence of natural justice, or rights, or, in other words, of the existence or non-existence of justice, or rights, independently of governmental institution. And this is regarded as so triumphantly established, as to put the question for the future beyond the pale of legitimate discussion, and to relegate the doctrine of Natural Right, or of Justice, and the ineradicable faith of the human race generally in the existence of natural rights, to the list of exploded delusions—such—to use the illustration of Sir Henry Maine—as the Ptolemaic theory of the universe, or the Pythagorean doctrine of the music of the spheres;—a position wholly unjustified, and which I take to be the most remarkable and striking illustration of the fallacy of *ignoratio elenchi* presented in the history of Philosophy.

(3) The argument of Austin in support of the doctrine of absolute sovereignty has served to convince two generations of English jurists and philosophers, and is fondly regarded by the existing generation, as an impregnable foundation upon which that theory may securely rest. On this account, whatever be our views with regard to the doctrine, the argument demands of us a most serious and careful examination. For, on the one hand, if it be valid, it has in fact recreated political science, and thus, as the Austinian jurists claim, rendered it necessary for us definitely to abandon, not only the doctrine of limited sovereignty, but also many other almost universal delusions. On the other, before accepting his paradoxical views, it behooves us to assure ourselves that the argument used to establish them is at least logically conclusive, and that we be not misled by merely verbal fallacies.

Briefly stated, his argument is that it follows, *ex vi termini*, from the definition of the law as consisting exclusively of the commands of the sovereign, that the power of the sovereign cannot be limited by law, or, in his own language, "is incapable of legal limitation;" or, stated syllogistically:

(1) Whatever is limited by law is limited by the commands of the sovereign. (2) The power of the sovereign is not limited by his own commands. (3) Ergo, the power of the sovereign is not limited by law. (*n*)

The three principal terms here used, as we have observed, are all extremely ambiguous; but in the present argument, as will be seen by reference to the passages cited in the note, they are precisely defined. The term *law* denotes merely the commands of the sovereign, and the term *sovereign*, the supreme government—whether consisting of a monarch or of a sovereign number—and the term *power, actual power*. The proposition, therefore, merely asserts that *the actual power or might of the government cannot be limited by its own commands*. Or, as the argument is expressed by Hobbes in the passage cited in the note: "To the civil laws, or to the laws which the sovereign maketh, the sovereign is not subject: For, if he were subject to the civil laws, he were subject to himself; which were not subjection, but freedom."

In this sense of the terms no objection can be made, either to the argument or the conclusion; but the latter—which, as defined, is without material significance—is habitually used by Austin and his school as equivalent to several essentially different propositions, and hence, the argument, thus used, presents an example, or rather several examples, of the fallacy of *ignoratio elenchi;* to which it will be necessary to advert in detail.

The most important of these is that the conclusion is habitually regarded and used by the Austinians as though a successful refutation of the theory to which they are opposed; which is that the rightful power, or right of the government is limited by law, in the sense of *jus;* of which, as will be seen, natural right or justice constitutes a part. And hence they regard as exploded, not only the proposition above stated, but also the hypothesis of natural rights, and of justice, or natural right. But obviously the conclusion of Austin is not the *elenchus*, or contradictory, either of the theory of limited sovereignty, or of that of natural right, but is entirely consistent with both.

The conclusion of Austin, that the power of the sovereign is unsusceptible of legal limitation, is expressly asserted by him to be equivalent to the proposition that "every free government is legally despotic;" which, he says, is "the same proposition dressed in a different phrase." But this is not the case; for, according to the most obvious sense of the terms, to say that the government is "legally despotic" is to say that it is by law vested with despotic power; which is obviously false, and, according to Austin's theory, impossible.

The conclusion asserted is also regarded by Austin and his school as a

refutation of the proposition that the power of the government may be limited by constitutional laws or statutes; and, consequently they assert that constitutional law, whether established by custom or by written constitution, is not in fact law. Which, at least to Americans, seems to be inconsistent with facts familiar to them from their own experience. For, in this country, the powers of all our governments, State and Federal, are, in fact, limited by written organic or constitutional laws; and it cannot be doubted, either that these are statutes or laws in the strictest sense, or that our governments are supreme or sovereign governments. Nor is this proposition inconsistent with the conclusions asserted by Austin. For, in his argument, the term "sovereign," is expressly defined as equivalent to "supreme government," and consequently the law, as consisting of the commands of the sovereign, as thus defined, or, in other words, of the commands of the government. But, in the popular, or, as it may be called, American doctrine—which asserts the possibility of limiting the power of the government by written constitutional laws—the sovereign whose commands are referred to, is the State as distinguished from the government, and consequently the law (*lex*) is regarded as consisting not only of statutes enacted by the ordinary legislature, but as including also statutes enacted by constitutional conventions. Hence, having regard to the double meaning of the terms used, the two propositions, though verbally, are not really, inconsistent, or, in other words, the one is not the *elenchus* of the other. For we may say, without contradiction, that the supreme government is at once sovereign, and not sovereign—*i. e.*, sovereign, as being the supreme government, or political organization in the State, but not sovereign, as being the State; and that while its power cannot be limited by laws enacted by itself, or, in other words, by its own commands, it may be limited by constitutional laws or commands of the State imposed by a constitutional convention.

Nor is the fact material—as claimed by Austin—that a constitutional convention is itself "an extraordinary or ulterior legislature;" * for such a convention is not a government, even when in session; and is still less so after it is dissolved, and its members mingled with the body of the people.

Nor is it true that constitutional laws are without sanctions, even as against the government. For, though no punishment is, or can be provided for the fictitious or imaginary being, who, in corporate governments, is conceived to be the sovereign—and who, in fact, as was observed by an eminent jurist, has neither a soul to be saved, nor a body to be kicked—yet provision may be, and is made for the punishment of the individual officers that constitute the government, or sovereign, and by whom its powers are actually exercised; and in this way our "artificial man" Leviathan, may be, and is, effectually controlled.

Finally, Austin seems to regard his conclusion as equivalent to the proposition of Sydney, that all governments must necessarily be vested with

* *Jur.*, 254.

"*arbitrary* powers." But this is not the case. For, obviously, the rights of the government must be more extensive than its functions, and, within the limit of its rights, its powers must necessarily be arbitrary. Thus, it is the function of a judge to administer justice, but his jurisdiction or right is to determine the controversy presented to him; and though, by mistake or even by deliberate intent, he may decide wrongly, this will not affect his jurisdiction. So, also, according to the Democratic doctrine, it is the function of the federal government, under the constitution, in levying duties, to levy them for purposes of revenue only, and it is a violation of its functions to impose them for the purpose of protecting manufactures, or for any other purpose; but, in order to enable it to perform this function efficiently, its right must extend in general to the power of imposing duties, even for illegitimate purposes.

The general acceptance by English jurists of Blackstone's definition of the law, and of the irrational theory founded upon it by Bentham and Austin, and the long continued dominion established by the theory over the English mind, is one of the most curious and instructive phenomena presented in the history of mankind. Nor is it possible to estimate fully the deleterious consequences that have thus resulted. Briefly, it may be said that it has eradicated from English jurisprudence, so far as the views of theorists can effect such result, the very notions of justice and reason, and has thus effectually isolated the English jurists from those of other ages and countries. The theory, and the numerous works of English jurists in support of it, are therefore to be regarded not merely as valueless, but as even positively deleterious to the intellect and the conscience of the nation; and, hence, the first step towards the rehabilitation of true jurisprudence must be the total eradication, not only of the theory itself, but of all the prejudices and false notions engendered by it. In no other way can we put ourselves in unison with the thought of the world on jurisprudence and political science. (*o*)

§ 9. *Bodin's Argument.*

To the above arguments may be added that of Bodin; who, in the opinion of Sir Frederick Pollock, "is entitled to share with Hobbes the renown of having founded the modern theory of the State,"* and with whom, certainly, the doctrine of sovereignty seems to have originated. In regular course, therefore, his argument should have been considered first; but, as I am unacquainted with his work, except at second hand, I was compelled to omit its consideration. His argument, as stated by Sir Frederick Pollock, in the paragraph cited, is as follows:

"In every independent community governed by law there must be some authority, whether residing in one person or several, *whereby the laws themselves are established and from which they proceed. And this power being the source of law must itself be above the law:* not above duty

* *History of the Science of Politics*, 19.

and moral responsibility, as Bodin carefully explains : *but above the municipal ordinances of the particular States—the positive laws,* in modern phrase *—which it creates and enforces.* Find the person or persons whom the constitution of the State permanently vests with such authority, under whatever name, and you have found the sovereign. 'Sovereignty is a power supreme over citizens and subjects, itself not bound by the laws.' This power is somewhere necessary to an independent State, and its presence is the test of national independence. Such is in outline the principle of sovereignty as stated by Bodin, taken up a century later by Hobbes, and adopted by all modern publicists, with more or less variation in the manner of statement." But obviously this argument, like that of Austin, rests upon the ambiguity of the term, law, as signifying either *lex* or *jus.*

Whether the argument of Bodin is correctly stated by the author cited, I do not know, but assume that it is. But if so, Bodin is extremely inconsistent ; for, according to the author, "he tells us of organic laws or rules which may be so very closely associated with the very nature of this or that sovereignty that they cannot be abrogated by the sovereign power itself, and he instances the rule of succession to the French Crown. Again, there are institutions of society, such as the family and property, which he assumes as the foundation of the State ; and with these even the sovereign power cannot meddle. From the inviolability of property he draws the consequence that not the most absolute monarch can tax his subjects without their consent."*

§ 10. *Historical Refutation of the Doctrine of Absolute Sovereignty.*

The doctrine of sovereignty is generally expressed in the proposition that the sovereign power, or sovereignty, is unlimited and indivisible. It is not explained by the advocates of the doctrine, whether the proposition refers to the actual or the rightful power of the sovereign ; that is to say, to his might or to his right. But in whatever sense the term is used, the doctrine—as we have seen—is not only without definite significance, or, in other words, *nonsense,* and the arguments adduced in support of it—even those of the most celebrated philosophers—a mere tissue of logical absurdities, but it is also inconsistent with the whole history of the European race, whose principal characteristic and fundamental political virtue has been, in sentiment, an abhorrence of unlimited power, and in practice, a determined resistance to it, and, in the long course of whose history, every epoch and place has been a living refutation of the doctrine.

Here in our own country, according to the unvarying decisions of the Supreme Court of the United States, and of all jurists possessed of even an elementary knowledge of the constitutional law, the sovereign powers are in fact divided between the federal government and the States ;

* *History of the Science of Politics,* p. 21.

and in each State and in the federal government they are again divided among several departments. Hence the power of each political community, and of each department, is limited by that of the others; and not merely is this so in theory, but the courts are empowered to pass upon the validity of every legislative or executive act, either of the general government or the States, and to declare them void if they transcend the limits of power imposed by the constitution.

So also, we were taught in our younger days that under the English constitution the sovereign power was vested in the king, the lords and the Commons, and that the participation of each of these was necessary to the validity of all legislation; and this was not only the doctrine of English lawyers and statesmen, but also of foreign publicists, who saw in it the peculiar excellence of the British constitution. Hobbes, indeed, had asserted that the sovereign power was vested in the king only, and that the doctrine that his single power could be resisted by Parliament was anarchical in its tendencies and therefore untenable, (*p*) and in the same way, the modern English jurists, or some of them, blindly assert that the sovereign power is vested in the Commons; but in fact the whole history of England is but an illustration of the practical workings of the theory, uniformly asserted by the lawyers, that the legislative power is equally vested in the three coördinate departments, and that neither has any power to act without the participation of the others. The relative power of each has, indeed, at different periods, varied extremely. In early ages the power of the king was most formidable; afterwards, the lords, and finally the Commons; but even now, it is simply an absurdity to say that any independent power is vested in the latter, for even in the last year or two we have seen it actually overridden and nullified by the lords; and so it must always be, until a revolution is effected.

But the most conspicuous illustration of the historical fallacy of the doctrine is presented by the constitution of the Roman Republic—the most famous, and one of the two or three most efficient and successful constitutions that ever existed; and a somewhat detailed examination of the provisions of this constitution will perhaps serve, better than any other, to illustrate the subject.

Under the monarchical government, the whole executive and judicial power was vested in the king, who held for life, and the legislative power, in the people. The actual power of the king was, in theory, not to be resisted by any citizen, and, in practice, it was as nearly irresistible as it was possible to be. But he had no power of legislation, and any act of his that went beyond the existing law was regarded simply as an exercise of unlawful power. (*q*) On the other hand, the people, in whom the legislative power was vested, could not act of their own motion, but only upon a law proposed by the king; or, in other words, the initiative of legislation was vested in the king. Nor was every legislative act of the people on the initiative of the king necessarily valid; there was still another department in the State, viz., the Senate, in whom was vested the

power of guarding the law itself, and nullifying such legislation as was clearly opposed to fundamental principles, or, as we would say, unconstitutional.

Originally, the people consisted of the patricians only, who acted in an assembly called the *Comitia Curiata*, and they alone bore the burdens of the government, and constituted the military force. But under what is called the Servian constitution, said to have been established by Servius Tullius, the population, whether patrician or plebeian, was divided into classes and centuries according to property qualification,—the classification being similar to that of the Athenian people by Solon. The intention of this arrangement was to make the plebeians, or those who had property, equally subject, with the patricians, to taxation and military service ; but the assembly of the citizens under this classification, called the *Comitia Centuriata*, gradually acquired legislative power, and took the place entirely of the *Comitia Curiata*. In this assembly, the classes were so arranged as to give a decisive advantage in voting to the higher classes.

Afterwards, under the republic, a new division of the people was made into tribes, and as the primary purpose of this was for the assessment and collection of taxes, the assembly of the citizens by tribes was called the *Comitia Tributa ;* and in this the votes of all the citizens were of equal force. This assembly also gradually acquired legislative power, and it finally became a coördinate legislature with the *Comitia Centuriata*. Each of these assemblies was vested with full legislative power, and each could repeal the acts of the other, or, in fact, either could, in theory, have abolished the other. In the one assembly, manhood suffrage prevailed ; in the other, a property qualification that gave the decisive power to the wealthy ; and these two coördinate legislative assemblies continued to exist alongside of each other during the whole period of the republic. (*r*)

Upon the abolition of the monarchy, instead of one king for life, the kingly power was vested in two officers, holding for a term of one year only, called consuls, in whom was vested all the powers of the king, not jointly, but in each separately ; so that either consul could act without the concurrence of the other, and either could annul the acts of the other, and, indeed, either could remove both himself and his colleague from power by nominating a dictator, in whom the whole kingly power became at once vested. These officers, that is, the consuls, or the dictator, had the power of punishing the citizen ; and this power extended even to the infliction of the death penalty, until, by the Valerian law, an appeal was provided, in the case of capital offenses, to the people. In addition, it was enacted that every citizen should have the right to kill any official, including the consuls, should he aspire to a tyranny, and that upon trial, proof of the fact should be sufficient to acquit him.

Originally, the political power, as we have said, was confined to the patricians, and afterwards to the patricians and the wealthy plebeians, and in consequence the plebeians were much oppressed. This resulted in the

first secession; and in the compromise by which this was settled, the office of the tribunate of the people was established. This consisted, at first, of two tribunes of the people, elected by the plebeians, whose persons were made sacred from arrest or outrage of any kind, and in whom was vested the power to veto any act of the consuls or other officers, or any legislation proposed; so that the power was, in fact as well as in theory, vested in them of stopping the wheels of government entirely. The number of the tribunes was afterwards increased, but this institution also continued throughout the whole history of the republic.

Comment upon these constitutional arrangements is unnecessary. We have here the sovereign powers of the government distributed, not merely among different officials and departments acting concurrently, but independently, in various officers and assemblies, opposed, and generally hostile to each other. And yet this constitution—than which, according to modern theories, nothing could be more absurd—was, in fact, the most successful in its operation that history has presented us with; and to it we owe the achievements of the Romans during the most successful part of their history, and ultimately the conditions of modern civilization.

§ 11. *Historical Genesis of the Doctrine of Absolute Sovereignty.*

The genesis of this theory is readily accounted for by the historical events out of which it grew. In the struggle between the kingly power and that of the feudal lords, in the Middle Ages, the former naturally came to be regarded as the last refuge of personal security, and the only hope of organized social life; and out of this arose an almost universal sentiment in its favor, which found its expression in the modern doctrine of sovereignty; and this doctrine either in its original form, as applied to a single monarch, or, in a secondary sense, as applied to other forms of government, has come to be so generally received in the political philosophy of Europe, that the term itself, in popular use, carries with it the connotation of being an absolute, despotic power, or right. And this notion, intensified by the events of the great English Civil War, and of the French Revolution, continues to prevail in Europe, and especially in England, and also to a considerable extent in this country.

Hence, obviously the doctrine is simply the exaggerated expression of a sentiment, just and natural in itself, in the form of an absolute proposition, and in this form it is obviously untrue. It is, indeed, sufficiently manifest that the power of government must be great; and we may even say with Hobbes: *Non est super terram potestas quæ comparetur ei.* But that it is, or should be, either unlimited or irresponsible, or that it should be any greater, within the limits of our power to restrict it, than necessary for the efficient performance of its functions, does not follow; nor is it possible to conceive of any argument tending to establish such a conclusion.

Nor is it probable that any one can be found who really believes in the doctrine. It would not be difficult to find in Hobbes' writings opinions inconsistent with it; and even by Bentham and Austin the doctrine is asserted with the anarchical qualification that the government may be resisted, or even overturned, when demanded by the vague principle of general utility. So in history, never has the doctrine been practically asserted by any but the predominant party in the government; nor has it ever had the slightest influence with the party in opposition. Nor are we without instances of revolutions effected by men who on previous occasions had most absolutely asserted the doctrine. Thus, among many other instances that might be cited, the cavalier and church party, who, in the great rebellion, supported Charles, and asserted in the most unqualified terms the principle of the divine right of kings, was not restrained by its doctrine, from joining with the revolutionary party to dethrone James. Nor can any one in this country be found who hesitates to justify our own Revolution, or any other of the great revolutions of history by which tyranny has been overthrown, and constitutional liberty established.

NOTES.

(a) "The ancient Greeks applied the name πολιτικη to all political science. We (Germans) distinguish Public Law (*Staatsrecht*) and Politics (*Politik*) as two special sciences. . . . .

"Public Law and Politics both consider the State on the whole, but each from a different point of view, and in a different direction. In order to understand the State more thoroughly, we distinguish its two main aspects—its existence and its life.

"Public Law (*Staatsrecht*) *deals with the State as it is, i. e.*, its normal arrangements, the permanent conditions of its existence.

"Politics (*Politik*), on the other hand, *has to do with the life and conduct of the State.*" —*The Theory of the State*, Bluntschli translation, p. 2. (The italics are the translator's.)

"The general science of Right is divided into three principal branches, each one of which forms a distinct science: First, *the philosophy of right*—an integral part of philosophy in general—expounds the fundamental principles of right, which result from the nature of man as a reasonable being, and determines the manner in which the relations between men ought to be established in order to conform to the idea of justice. It creates thus, not a chimerical, but an ideal State, towards which social life ought more and more to approximate. On the other hand, *the history of right*—an integral part of history in general—makes us know the changes that the laws and the institutions of a people have undergone at different epochs of their civilization. Their present state, so far as it is comprised in the principles of right actually in force, is determined by positive right, private and public; while civil and political statistics, which are a part of general statistics, make us know the totality of facts which characterize the state of private and political law. Positive right is comprised in the history of right, because it changes continually with the culture of the people. Finally the science intermediary between the science and the history of right, and bearing upon both, is *political science* (or Policy, *la science politique*). It demands on one hand, from the philosophy of right, the knowledge of the end of society, and of the general principles of its civil organization, and consults, on the other, in history and positive right, and in statistics the antecedents of a people, the character and the manners which it has manifested in its institutions, the actual state of its culture, and its exterior relations with other nations. It is from this data that political science expounds the reforms for which the State is prepared by its

previous development, and which it can actually realize. Policy (*la politique*) is, then, the science which, upon a historic basis, and in the measure of existing forces, expounds the totality of the conditions and of the means proper to assure continued progress, and to realize the reforms immediately demanded of the social state."—Ahren's *Cours de Droit Naturel*, § 2.

(*b*) There can be no doubt that the present age is as distinctly unlogical, as the age prior to that of Bacon was unscientific, and that in political and social science, and in the science of human nature generally—in the investigation of which logic must always be an indispensable instrument—the great demand of the times is the revival of the use of logic, and our motto here, as elsewhere, should be, "Back to Aristotle."

"We . . . . live in an age," says De Morgan, "in which formal logic has long been nearly banished from education; entirely we may say from the education of the habits. The students of all our universities (Cambridge excepted) may have heard lectures and learned the forms of syllogism to this day; but the practice has been small; and out of the universities (and too often in them) the very name of logic is a by-word.

"The philosophers, who made the discovery (or what has been allowed to pass for one), that Bacon invented a new species of logic which is to supersede that of Aristotle, and their followers have succeeded by false history and falser theory in driving out from our system all study of the connection between thought and language. The growth of inaccurate expression which this has produced gives us swarms of legislators, preachers and teachers of all kinds who can only deal with their own meaning as bad spellers deal with a hard word—put together letters which give a certain resemblance, more or less, as the case may be. Hence, what have been aptly called the slipshod judgments and crippled arguments which every-day talkers are content to use. Offenses against the laws of syllogism (which are all laws of common sense) are as common as any species of fallacy; not that they are always offenses in the speaker's or writer's mind, but that they frequently originate in his attempt to speak his mind. And the excuse is that he meant differently from what he said; which is received because no one can throw the first stone at him; but which, in the Middle Ages, would have been regarded as a plea of guilty." —*Formal Logic*, pp. 240, 241.

"The above," continues the author, after treating of the several fallacies, "were the forms of fallacy laid down as most essential to be studied by those who were in the habit of appealing to principles supposed to be universally admitted, and of throwing all deduction into syllogistic form. Modern discussions, more favorable, in several points, to the discovery of truth, are conducted without any conventional authority which can compel precision of statement: and the neglect of formal logic occasions the frequent occurrence of these offenses against mere rules which the old enumeration of fallacies seems to have considered as sufficiently guarded against by the rules themselves, and sufficiently described under one head, the *fallacia consequentis*. For example, it would have been a childish mistake, under the old system, to have asserted the universal proposition, meaning the particular one, because the thing is true in most cases. The rule was imperative: '*not all*' must be '*some*,' and even '*all*,' when not known to be '*all*,' was '*some*.' But in our day nothing is more common than to hear and read assertions made in all the form, and intended to have all the power, of universals, of which nothing can be said except that most of the cases are true. If a contradiction be asserted and proved in an instance, the answer is: 'Oh! that is an *extreme case*.' But the assertion had been made of *all* cases. It turns out that it was meant only for ordinary cases. Why it was not so stated must be referred to one of three causes—a mind which wants the habit of precision which formal logic has a tendency to foster, a desire to give more strength to a conclusion than honestly belongs to it, or a fallacy intended to have its chance of reception.

"The application of the *extreme case* is very often the only test by which an ambiguous assumption can be dealt with: no wonder that the assumer should dread and protest against a process which is as powerful as the sign of the cross was once believed to be against evil spirits. Where anything is asserted which is true with exception, there is often great difficulty in forcing the assertor to attempt to lay down a canon by which to distinguish the rule from the exception. Everything depends upon it; for the question

will always be, whether the example belongs to the rule or to the exception. When one case is brought forward which is certainly an exception, the assertor will, in nine cases out of ten, refuse to see why it is brought forward. He will treat it as a fallacious argument against the rule, instead of admitting that it is a good reason why he should define the method of distinguishing the exceptions: he will virtually and perhaps absolutely demand that all which is certainly exception shall be kept back, simply that he may be able to assume that there is no occasion to acknowledge the difficulty of the uncertain cases."—*Id.*, pp. 270, 271.

(*c*) "After mathematics, physical science is the least amenable to the illusions of feeling. . . . .

"The processes of scientific induction involve only the first elements of reasoning, and present such a clear and tangible surface as to allow no lurking place for prejudice; while questions of politics and morals, to which the deductive method, or common logic, as Bacon calls it, is peculiarly applicable, are ever liable to be swayed or perverted by the prejudices he enumerates" (*Novem Organum*, Aph. xl, Editor's note). The last reference is to Bacon's celebrated doctrine of Idols (εἴδωλα, illusions, or false appearances)—*Organum*, Aph. xxxviii, *et seq.*—one of the most profound and valuable parts of his works, and which we cite as authority for our own strictures.

It may be added that the logical processes involved in the Mathematical and the Experimental Sciences are so extremely simple as to render their non-observance almost impossible; while in Politics, Morality, and the science of human nature generally, they are so difficult as hardly to be overcome by the greatest genius.

Of this, the most striking example is presented by the celebrated Hobbes—the most powerfully logical genius and the most profound political philosopher since Aristotle. But his preëminent mental gifts were, to a large extent, neutralized by the almost insane dread of the miseries of civil war, generated by his own experience, or inherited from his mother: of whom it is related that she was prematurely delivered of the philosopher by reason of the fright into which she was thrown by the report of the approach of the Spanish Armada. From this and the associations of his life he was naturally led to espouse the royal cause in the great rebellion; and thus it resulted that his work, composed at an advanced age, after his political opinions were formed, is but a magnificent polemic in support of a preconceived conclusion, originating in the idiosyncrasies of his nature, and his peculiar experiences. Yet, in the opinion of Leibnitz, he was one of "the only two" (the other was Grotius) "who were capable of reducing morals and jurisprudence to a science." "So great an enterprise," he says, "might have been executed by the deep searching genius of Hobbes, if he had not set out from evil principles" (McIntosh's *Dissertations*).

As it is, his works, on account of the unrivaled style, the logical power, and the profound and penetrating genius displayed in them, constitute by far the most valuable contribution to political science in modern times; and, in the critical examination to which I propose to subject them, it is my hope, that I may not only point out the dangerous fallacies contained in his reasoning, rendered trebly formidable by his logical skill and polemical ability, and by a style that is nearly the perfection of expression, but that I may also call back the attention of my readers to writings preëminently deserving of consideration, not only from their intrinsic merits, but from the fact that in them is to be found the source and spring of modern political philosophy.

Another instance, no less striking, is presented by Austin—a writer hardly inferior to Hobbes in logical capacity, and far more fair-minded and disposed to observe the requirements of logic, and one whose works, in the department of jurisprudence, are hardly of less value than those of Hobbes. As far as can be judged there was no particular disposition on his part towards arbitrary government, but the particular bias (or, as Bacon would call it, idol) to which he was subjected was the notion, derived from Bentham and Blackstone, that the law (*jus*) is mere expression of the will of the sovereign or supreme government. This he accepted, with unquestioning faith, as his first principle, and from it, with an intrepidity of logic that is much to be admired, he deduced his whole theory.

(*d*) The doctrine of absolute sovereignty is at once an attempted solution of the problem of the rights, or rightful powers, of the State—which will be discussed fully in the body of

this work—and, also, to a certain extent, a theory as to the nature of the State. Regarding it as wholly false, and as even absurd, I deem it a matter of importance, in order to avoid embarrassment in our investigations, to dispose of it before entering upon our main subject. Otherwise, as will be seen, we would find it necessary, at every step of our progress, to interrupt our investigations in order to refer to and refute this almost universal prejudice.

Another motive, scarcely less powerful, for introducing the subject here is to vindicate the strictures contained in the text as to the almost universal non-observance of logic by modern political theorists, and the resulting fallacious and inconsequent methods of reasoning characterizing their writings. In executing this task, I shall freely avail myself of the technical names of the several fallacies used by logicians; for, though this may give something of the appearance of pedantry to my discourse, there is no other method by which the task can be so briefly and effectively accomplished.

(*e*) The terms "sovereign" and "sovereignty" have widely departed from their original meaning. The former term is equivalent to the low Latin *superanus* (formed with suffix *anus* from Latin *super*), and etymologically it denotes merely superiority, and hence, in a political sense as originally used, it denotes merely the monarch or other supreme officer of a State, and its correlative, *sovereignty*, the power vested in the sovereign. Both terms are strictly comparative, and there is nothing in them to imply that the sovereign or supreme power in the State is absolute or unlimited; all that is implied is that the sovereign is superior to the other officers of the State, and his power superior to theirs. Hence, as originally used, the terms were applied with equal propriety, not only to the king or monarch, but to his feudatories, who each were said to be sovereign in their own domain. Afterwards the term came to be restricted to the monarch only, from whom it was transferred to the government generally; and afterwards, as will be explained, to the State as distinguished from the government and various other abstractions. The term is, therefore, now one of the most vague in the language, and, as observed by a late American writer, it "is seldom used by two respective writers as embodying the same notion, and is oftener used to supply the absence of a distinct notion"—that is to say, it is used by different writers with all sorts of different meanings, and still more frequently without any distinct meaning at all. He is, therefore, of the opinion, in which I entirely agree, that "because of its uncertainty, of its special unfitness as applied to a federal State, and of its suggestion of absolutism, the word should be dropped," or, at least, ostracised for a while. "As used by some," he adds, "it is not deceptive or dangerous; but it will not be so used, and in the future as in the past will breed disorder and anarchy" (Bliss on *Sovereignty*, pp. 172, 175).

In order to guard against the numerous unfortunate associations of the term, we subjoin the just and sober observations of Mr. Ahrens upon the subject:

"The *sovereignty* . . . . has been confounded with omnipotence and absolutism, and centralized, instead of being conceived organically and as dividing itself among the several domains of the social order. Nevertheless this conception is in accord with the true sense of the word. Many theories, it is true, have been built upon the nature of sovereignty (a vague word originating in the Latin of the Middle Ages from *superioritas superanus*), which lends itself readily to arbitrary conceptions, but, according to its true sense, the term denotes merely a power which, in its own domain, decides finally without being submitted in this respect to a superior authority. In this sense we rightly speak of a court of justice which decides finally as sovereign, but as the social order is an organic whole of several spheres of life, of which each ought, in virtue of its autonomy, to decide, in last resort, upon a certain class of relations left to its determination, each sphere of life is sovereign in its degree and in its kind. This acceptation of the notion of sovereignty was not unfamiliar to the epoch of the Middle Ages. . . . . In effect, in the feudal hierarchy, the sovereignty was always attributed to the last member. 'Each baron,' says Beaumanoir, 'is sovereign in his barony.' . . . . What is said here of the baron applies to-day to every free personality. . . . . Every man is sovereign in the sphere of action where it belongs to him to act finally without being responsible to a superior authority. It is the same with the family and with the commune. . . . .

"As to the mode of exercise of the sovereignty, it is to be received as a fundamental

principle that like all power it ought to be a sovereignty of right" (*Cours de Droit Naturel*, § 110).

(*f*) Or rather, we should say, that the real sovereign consists of the managers who control the assembly. For nowhere is the saying truer that there is a power behind the throne greater than the throne than in the case of large assemblies, which experience has demonstrated are incapable of rational and consistent action, and are always controlled either by committees or by party managers. This notion, as will be seen, is in fact embodied in one of the numerous doctrines of sovereignty, of which the present day is extremely prolific" (*infra*, p. 200).

(*g*) A striking illustration of the danger of using the term sovereignty, even thus qualified, is presented by Mr. Von Holst, in his *Constitutional History of the United States*, or rather the first volume of it. The conclusion there reached (I say "*conclusion*," because the history seems to have been written for the purpose of establishing the proposition) is that "Sovereignty is One and Indivisible—the Sovereignty of Law."

This is apparently an innocent, though certainly not a self-consistent proposition. For if the law be sovereign, it must follow that there are as many different sovereigns as there are laws; and hence that in every State of the United States there must be two sovereigns, for in each there are two different and entirely independent systems of law. But, in fact, the doctrine of the sovereignty of the law, though formally asserted by him, is not the doctrine he has in his mind. His real doctrine—to the establishment of which all his facts and arguments are marshaled—is that sovereignty is indivisible, and therefore vested exclusively in the Federal Government, and not to any extent in the States. In other words, the obvious, and I may say avowed purpose of his work is to teach us—who, for over a hundred years, under the uniform decisions of the courts, and the concurring opinion of constitutional lawyers of all political faiths—have believed ourselves to be living under a divided sovereignty—that we have been living under an impossible delusion, thus presenting an instructive example of how difficult it is for a man to escape the influence of his early environment, and the consequent almost impossibility for a European to comprehend the simple and rational doctrine of political power, unreservedly accepted by the founders of our Constitution, uniformly affirmed by our courts and our statesmen, and rendered familiar to us by long use; which is, that the sovereign or supreme powers of government may be, and in fact are, distributed between the General Government and the State governments, and in each among the several departments of the Government. (On this point see further *infra*, pp. 229, *et seq.*)

"In view of the danger of the common notion of sovereignty and the necessity of submitting it to a superior principle, several eminent publicists (Royer-Collard, Guizot and others) have sought to transfer the sovereignty itself into an ideal sphere and to place it in reason, truth or justice. But sovereignty expresses a mode of action of the will, and, hence, pertains always to living persons, individual or collective; but it is of high importance to comprehend that it ought to be exercised like all will, according to the principles of reason and of justice."—Ahren's *Cours de Droit Naturel*, § 110, "De la Souverineté."

The same observation is made by Mr. Bliss: The conception "of Guizot, which enthrones justice, reason, as the only sovereign, commands our reverence, yet in fact it is but a denial that sovereignty can exist among men; it destroys the word by giving it to an obligation; it is not a figment of the imagination like the social contract; it is a metaphor—a sublime one, but of little use in our present inquiries." "How sublime," he adds, "is Guizot's metaphor, and how welcome the word as he uses it. Justice, reason, law, as embodying its dictates, is alone sovereign; let the notion of any other sovereign be trampled under foot" (Bliss on *Sovereignty*, pp. 172–175).

Thus amended the doctrine is but a reëxpression of the opinion of Aristotle. (*Politics*, b. 3, c. 16): "Moreover, he who bids the law be supreme makes God supreme; but he who intrusts man with supreme power gives it to a wild beast, for such his appetites often make him."

(*h*) It is well explained by Hobbes, that in matters of experience where we fail to judge correctly, it is simply an "error," or erroneous opinion. But when we make a mistake

in reasoning, or, as it is commonly called, deductive reasoning. the result is not merely an erroneous opinion, but an absurdity, or *nonsense*. As the passage is one of extreme interest, and containing a truth of great importance, I quote it at length:

"When a man reckons without the use of words, which may be done in particular things, as when upon the sight of any one thing we conjecture what was likely to have passed, or is likely to follow upon it, if that which he thought likely to follow follows not, or that which he thought likely to have passed hath not passed, this is called 'error,' to which even the most prudent men are subject, but when we reason in words of general signification and fall upon a general inference which is false, though it be commonly called 'error,' it is indeed an 'absurdity,' or senseless speech; for error is but a deception in presuming that something is passed or to come; of which, though it were not passed, or not to come, yet there was no impossibility discoverable. But when we make a general assertion, unless it be a true one, the possibility of it is inconceivable, and words whereby we conceive nothing but the sound are those we call 'absurd,' 'insignificant,' and 'nonsense' (*Leviathan*, p. 28). In other words, to talk illogically is to talk nonsense. And, as very few of us are logical, and none of us always so—like Moliere's hero, who was unconscious that he talked prose—we talk nonsense all our lives without knowing it. Socrates discovered this more than two thousand years ago, and the great need of the age is to rediscover it."

(*i*) Bentham was never tired of reproaching the lawyers with their use of legal fictions or of repeating that a fiction is not an argument, and the charge is repeated *ad nauseam* by his followers; and one of them, Sir Henry Maine, has even based a theory upon it. But it may be said that the legal fiction of the lawyers is always recognized as such, and never used as an argument, but merely as a convenient form of expression, or as a convenient means of reconciling a true doctrine with some arbitrary rule that cannot be disavowed, and that its use is governed by the maxim: *In fictione juris semper æquitas existit;* while the fictions of philosophers, such, for instance, as the social contract, though known by them to be false, are stated and argued from as though in fact true, and without any regard to the extravagance of the conclusions they may lead to.

(*j*) On this point Hobbes, and the modern English jurists,—who are at one with him—occupy precisely the position of the ancient cosmologists, who explained the stability of the world by supposing it to rest ultimately on a turtle, but did not explain upon what the turtle rested. In the same way these jurists regard private rights as resting upon the will of the State, but in denying the existence of natural right they render it impossible to conceive of any foundation upon which the right of the State can be rested.

(*k*) It will be observed here that while the argument of Kant rests mainly upon the fiction of the personality of the State, and of its supposed will representing "the united will of the people," it involves also other fallacies incidentally referred to to eke out the reasoning.

The first consists of the ambiguous proposition that it is only by submission to the legislative will that a condition of law and order is possible; which may mean either a general submission or an absolute submission without exception. The former proposition is altogether true, and it is difficult to exaggerate the importance of the duty of the citizen to obey the government; but the latter is not only false, but is inconsistent with the very existence of social order, the true foundation of which is, the consciousness of inviolable rights in the subject, and the manly determination in the last resort to vindicate them by force even against the government. The ideal State is not composed of slaves to human power, but, in the noble language of Sir William Jones, of men "who their duties know, ... but know their rights, ... and knowing, dare maintain them."

The other fallacy consists in the argument, that the power of the State would not be supreme if it might be resisted, and consequently, "to limit its supreme power is a contradiction." But obviously the term "supreme power" is merely comparative, and denotes nothing more than the highest political power in the State, which, if we use the term "power" in the sense of right, is necessarily limited by right, and if we use it in the sense of actual power, may be, and in fact is, limited in various ways.

(*l*) "*Ab extra*," continues the author, "this is so. I have always endeavored to show that the *effective majority* has a right (a legal right) to do just what it pleases. How can the weak set a limit to the power of the strong? . . . .

"The time comes in the life of every government when it becomes effete, when it rules the stronger by sheer force of prestige; when the bubble waits to be pricked, and when the first determined act of resistance brings the whole card-castle down with a crash. The *bouleversement* is usually called a revolution. On the contrary, it is merely the outward and visible expression of a death which may have taken place years before. In such cases a limit can be set to State interference by the simple process of exploding the State. But when a State is (as Hobbes assumes) the embodiment of the will of the effective majority—*force majeure*—of the country, then clearly no limit can be set to State interference—*ab extra*. And this is why Hobbes (who always built on fact) described the power of the State as absolute. This is why he says that each citizen has conveyed all his strength and power to the State. I fail to see any *a priori* assumption here. It is the plain truth of his time and of our own. . . . . We must never forget that . . . . rights, when created, are created by the will of the strong for its own good pleasure, and not carved out of the absolute domain of despotism by a higher court of eternal justice. . . . . It is the absence of all this *a priori* vaporings common to Locke, Rousseau and Henry George, which renders the writings of Hobbes so fascinating and so instructive."

(*m*) The opprobrium justly resting upon English and American lawyers, for their simplicity in accepting this definition, is much heightened by the curious fact that the definition itself was the result of a blunder on the part of Blackstone, which, in any country, where the slightest knowledge of the Roman law survived among the lawyers, could not have escaped immediate detection. It is a telling commentary on our proficiency in that law, that the mistake remained undiscovered, and the definition universally accepted for over a century.

The definition obviously originated in the failure of Blackstone to comprehend the term *jus civile* as used in the Roman law. According to the conception of the Roman lawyers, the law is made up of two elements, viz., the *jus gentium* and the *jus civile*: the former consisting of those rational principles which are common to, and constitute the substantive part of all systems of law; and the latter, of the arbitrary or accidental rules peculiar to any given system. According to this conception, the *jus civile* constituted not the whole, but only a part of the law; and, if we have regard to importance, rather than bulk, a very inconsiderable part of it. But Blackstone unfortunately mistook it for the whole, and avowedly founded his definition upon it.

(*n*) I append at length the argument of Austin as variously stated by himself:

"It results from positions which I shall try to establish . . . . that the power of a sovereign is incapable of legal limitation" (*Jur.*, 264).

"Every positive law, or every law simply and strictly so called, is set directly or circuitously by a sovereign person or body to a member, or members, of the independent political society wherein that person or body is sovereign or supreme" (*Id.*, 270).

"Now, it follows from the essential difference of a positive law, and from the nature of sovereignty and independent political society, that the power of a monarch, properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of legal limitation. A monarch or sovereign number, bound by a legal duty, were subject to a higher or superior sovereign; that is to say, a monarch or sovereign number, bound by a legal duty, were sovereign and not sovereign. Supreme power limited by positive law is a flat contradiction in terms" (*Id.*).

"The proposition that sovereign power is incapable of legal limitation, will hold universally or without exception."

Hence, "against a monarch, properly so called, or against a sovereign number in its collegiate and sovereign capacity, constitutional law and the law of nations are nearly in the same predicament; each is positive morality rather than positive law" (*Id.*, 277).

"But if sovereign or supreme power be incapable of legal limitation, or, if every supreme government be legally absolute, wherein (it may be asked) doth political liberty exist, and how do the supreme governments, which are commonly deemed free, differ from the supreme governments, which are commonly deemed despotic?

"I answer that political or civil liberty is the liberty from legal obligation which is left or granted by a sovereign government to any of its own subjects, and that since the power of the government is incapable of legal limitation, the government is legally free to abridge their political liberty at its own pleasure and discretion" (*Id.*, p. 281).

"Every supreme government is free from legal restraints: or (which is the same proposition dressed in a different phrase), every supreme government is legally *despotic*. The distinction, therefore, of governments into *free* and *despotic*, can hardly mean that some of them are freer from restraints than others; or, that the subjects of the governments which are denominated *free* are protected against their governments by positive law" (*Id.*, 283).

"That the power of a sovereign is incapable of legal limitation, has been doubted and even denied, but the difficulty, like thousands of others, probably arose from a verbal ambiguity. The foremost individual member of a so-called limited monarchy is styled, improperly, *monarch* or *sovereign*. Now the power of a monarch or sovereign, thus improperly so styled, is not only capable of legal limitations, but is sometimes actually limited by positive law; but monarchs or sovereigns, thus improperly so styled, were confounded with monarchs and other sovereigns in the proper acceptation of the terms. Since the power of the former is capable of legal limitations, it is thought that the power of the latter might be bound by similar restraints. Whatever may be its origin, the error is remarkable. For the legal independence of monarchs, in the proper acceptation of the term, and of sovereign bodies in their corporate and sovereign capacities, not only follows inevitably from the nature of sovereign power, but is also asserted expressly by renowned political writers of opposite parties or sects: by celebrated advocates of the governments which are decked with the epithet *free*, and by the celebrated advocates of the governments which are branded with the epithet *despotic*."

"If it be objected," says Sydney, "that I am a defender of arbitrary powers, I confess I cannot comprehend how any society can be established or subsist without them. The difference between good and ill governments is not that those of one sort have an arbitrary power which the others have not, for they all have it; but rather, in those which are well constituted, this power is so placed as it may be beneficial to the people."

And he concludes by quoting the opinion of Hobbes, that he "who hath the sovereign power is (not) subject to the civil laws. For if he were subject to the civil laws, he were subject to himself, which were not subjection, but freedom" (*Id.*, 286, 287).

(*o*) Of late years many of the works of German jurists have been translated into English, and from this, and the happy cessation of works by English Austinian jurists, of which the English press was previously prolific, it may be inferred that the reign of Austin over the English mind is coming to an end. Indeed, it is said by Sir Frederick Pollock, in the *Law Quarterly Review*, with what truth I cannot presume to judge, that Austin's theory is now regarded by advanced jurists in that country as "dead and buried;" and, in a late number of the *Review*, we find an article by the same author in which a more rational view of the nature of law and of natural right is very aptly expounded. But, as the whole literature of modern English jurisprudence, including the writings of Sir Frederick Pollock himself, has hitherto been devoted to the establishment of the Austinian heresy, he should have explained to his readers the fact that English jurists have been wandering for over forty years in the wilderness of Austin's speculations, and that what they have hitherto taught has been false and misleading. For, until the prejudices engendered by Austin's theory are removed, and the sequelæ of the disease eradicated, there can be no room for a more rational investigation of the subject, and many readers will have great difficulty in reconciling their former with their present teachings.

(*p*) "These are the rights which make the elements of sovereignty, and which are the marks whereby a man may discern in what man or assembly of men, the sovereign power is placed and rests. For these are incommunicable and inseparable. The power to coin money, to dispose of the estates and persons of infant heirs, etc. . . . . may be transferred by the sovereign, and yet the power to protect his subjects be retained. But if he transfer the militia, he retains the judicature in vain, for want of execution of the laws; or, if he grant away the power of raising money, the militia is in vain; or if he give away the government of doctrines, men will be frightened into rebellion with the fear of spirits. And so, if he con-

sider any one of said rights, we shall presently see that the holding of all the rest will produce no effect in the conservation of peace and justice, the end for which all commonwealths are instituted. And this division is it whereof it is said, "a house divided in itself cannot stand," for unless this division precede, division into opposite armies can never happen. If there had not first been an opinion, received by the greatest part of England, that those powers were divided between the King and the Lords and the House of Commons, the people had never been divided and fallen into this civil war, first, between those that disagree in politics, and after, between the dissenters about the liberty of religion; which have so instructed men in this point of sovereign right that there be few now in England that do not see that these rights are inseparable. It will be so generally acknowledged at the next return of peace, and so continue till their miseries are forgotten; and no longer—except the vulgar be better taught than they have hitherto been" (*Lev.*, p. 88).

The doctrine "that the sovereign power may be divided," is "plainly and directly against the essence of a commonwealth." "For what is it to divide the power of a commonwealth but to dissolve it; for powers divided mutually destroy each other" (*Id.*, 149).

In connection with this proposition, is to be noted a strange contradiction in Hobbes' doctrine. For—as has been shown—the sovereign powers are necessarily divided in every form of government, except that of a simple monarchy; yet he admits that there may be "three kinds of commonwealths; namely, 'Monarchy,' where 'the representative (or sovereign) is one man;' 'Democracy,' where the sovereign is 'an assembly of all that will come together,' and 'Aristocracy,' where the sovereign is 'an assembly of part only,'" (*Id.*, 85). This concession was, however, forced upon him by the necessity of admitting the historical existence of such forms of government. But in his opinion the first was at least the preferable, and perhaps the only legitimate form (*Id.*, pp. 92, *et seq.*).

(*q*) One of the most deleterious effects of the Austinian theory upon the minds of the modern English jurist, is that it has apparently rendered him incapable of conceiving a power limited by right unless the right is also capable of being enforced. To his mind "a right without a remedy is a vain thing;" by which he understands that such a right cannot exist; and to him the notion that the power (*i. e.*, the right) of the Roman king was limited by law, while in fact his actual power was practically irresistible, is incomprehensible. But the passage cited had a nobler meaning in the mind of Chief Justice Holt, by whose lips it was first uttered; the inference drawn from it by him was, that where the remedy was wanting, it ought to be furnished—as expressed in the maxim of the law: *ubi jus ibi remedium*. And in fact such is the constitution of human nature, that where a right is firmly fixed in the conscience of a people, it will sooner or later find its remedy. And, even though the remedy be long coming, it will only render the case more hopeless to infer therefrom that the right does not exist. Thus, at Rome, during the monarchy, no legal remedy could be found for the violation of the law by the king; nor could he be made in any way responsible; for he was king for life, and, when he ceased to be king, could no longer be reached by human power. But when, for the king holding for life, there were substituted consuls, chosen annually, in whom was vested the kingly power unaltered, the principle at once came to have a practical application; for while the consul's power was irresistible, and his person sacred, during his term, he became liable upon its expiration, and, like any other person, might be called to account for his violation of the law—as was frequently exemplified in actual practice.

An analogous case is presented by the early Norman kings of England; whose power—as elsewhere under the feudal system—could in practice be restrained only by force. It was, however, a principle of the law then recognized, that the power or right of the kind was limited by the law; or, as expressed in Bracton's maxim: "*Ipse autem rex non debit esse sub homine, sed sub Deo et lege, quia lex facit regem*" (Spence, *Eq. Jur.*, 125).

Among the limits thus imposed by the law upon the king's power was the principle of immunity of life, person, and property in the citizen. This right was habitually violated, and with impunity, by the king; but the principle nevertheless continued to be recognized and asserted, and after a long struggle, commencing with *Magna Charta*, in the reign of John, and ending with the *habeas corpus* Act, in the reign of Charles II, it was finally vindicated in practice, and the power of the king effectually limited.

(*r*) The nature of this political arrangement is graphically described by Hume; *Essays*, Part ii, Essay 10; from which we extract the following:

"A wheel within a wheel, such as we observe in the German empire, is considered by Lord Shaftesbury as an absurdity in politics: but what must we say to two equal wheels which govern the same political machine, without any mutual check, control, or subordination; and yet preserve the greatest harmony and concord? To establish two distinct legislatures, each of which possesses full and absolute authority within itself, and stands in no need of the other's assistance, in order to give validity to its acts; this may appear, beforehand, altogether impracticable, as long as men are actuated by the passions of ambition, emulation, and avarice, which have hitherto been their chief governing principles. And should I assert, that the State I have in my eye was divided into two distinct factions, each of which predominated in a distinct legislature, and yet produced no clashing in these independent powers, the supposition may appear incredible. And if, to augment the paradox, I should affirm, that this disjointed, irregular government, was the most active, triumphant, and illustrious commonwealth, that ever yet appeared, I should certainly be told, that such a political chimera was as absurd as any vision of priests or poets. But there is no need for searching long, in order to prove the reality of the foregoing suppositions: for this was actually the case with the Roman republic.

"The legislative power was there lodged in the *comitia centuriata* and *comitia tributa*. In the former, it is well known, the people voted according to *census;* so that when the first class was unanimous, though it contained not, perhaps, the hundredth part of the commonwealth, it determined the whole; and, with the authority of the senate, established a law. In the latter, every vote was equal: and as the authority of the senate was not there requisite, the lower people entirely prevailed, and gave law to the whole State. In all party divisions, at first between the patricians and plebeians, afterwards between the nobles and the people, the interest of the aristocracy was predominant in the first legislature; that of the democracy in the second: The one could always destroy what the other had established: Nay, the one, by a sudden and unforeseen motion, might take the start of the other, and totally annihilate its rival, by a vote, which, from the nature of the constitution, had the full authority of a law. But no such contest is observed in the history of Rome: no instance of a quarrel between these two legislatures; though many between the parties that governed in each. Whence arose this concord, which may seem so extraordinary? . . . .

"No instance is found of any opposition or struggle between these *comitia;* except one slight attempt of this kind, mentioned by Appian in the third book of his civil wars."

There is some confusion as to the various Roman legislatures, which it would be hopeless to attempt to untangle in the brief space at our command. It seems, however, that another assembly, the *Concilium Plebis*, from which the patricians were excluded, was at a later date also vested with legislative power. But this assembly, though differing in its mode of action, was, in the power it represented, scarcely distinguishable from the *Comitia Tributa*. (See on this point, Momsen's *History*, and the article on "Roman Law" in the *Encyclopedia Britannica*.) At a later period the Senate also acquired independent legislative power; and, on the institution of the empire, the emperor also. Accordingly, in Justinian's collections, the different kinds of statutes are enumerated as consisting of *leges, plebiscita, Senatus consulta, principum placita*, corresponding respectively to the several legislatures named in the text, and in this note.

CHAPTER I.

Of the Nature of the State.

§12. *Of the Definition of the State, and of Its Several Kinds.*

(1) From what has been said in the Introduction, it may be inferred that political science in its present state, is beyond all others prolific in logical fallacy ; and this conclusion will be found to be verified at every step of our further progress. This arises, not from any peculiar lack of ability in political writers—for, as we have seen, those who are responsible for these fallacies, are the very foremost of their class, and some of them preëminent, among all classes, in genius and even in logical capacity—but principally from two causes already adverted to, that are characteristic rather of the age than of any particular class or individual—namely, bias or prejudice, and contempt, or, at least, practical neglect of logic.

The latter, as we have observed, is in great measure, an effect, of which the former is the cause. For, in the absence of disturbing causes, to reason logically is, for men of some clearness of intellect, as natural as to walk in the right direction ; or, if a mistake occurs, it is readily detected. But where men reason only to support preconceived opinions, in whose favor they are warmly interested, there is no absurdity of which they are not capable. And it may be added, as bias is the most fruitful cause of the non-observance of the rules of logic, so the rigid observance of those rules is the only effectual remedy for it.

Hence, in our own investigations, to avoid the pitfalls into which others have fallen, it behooves us, above all things, to be careful in our logical processes ; and on this account it will be found advantageous, even at the expense of some appearance of pedantry, to continue to make use of familiar logical rules and logical terms.

Of all the fallacies to which political writers are addicted, the most common, and at the same time most serious, is the fallacy of *petitio principii*, or of the illegitimate assumption of first principles. It has indeed been said that all logical reasoning necessarily involves a *petitio principii*, and this is so far true that in every syllogism the conclusion is in fact involved in the premises, and when the premises are admitted, inevitably follows. And so, in any legitimate chain of deductive reasoning, however extensive, the last conclusion is in fact involved in the premises first assumed, or, in other words, in the first principles—as for instance, the most recondite theorems of mathematics, in a few simple maxims and definitions. Nor is reasoning possible without the assumption of first principles. Until these are agreed upon all discussion is mere sound.

Generally our first principles must be obtained from observation of

facts, or, in other words, from experience; and, as all men are more or less observers, and as the facts from which our notions in political and moral subjects are, to a certain extent, obvious, there results necessarily a more or less agreement among men with reference to these matters, and the conclusions thus reached are embodied in familiar speech, and thus become established as part of the mental furniture of mankind. Hence, in deductive reasoning generally, it is not required of us to go back to the ultimate principles of all knowledge, but we legitimately commence with propositions which are regarded as established. But, in doing this, it is essential for us to examine such propositions with care, in order to satisfy ourselves there is no objection to them, and to state them in such clear and unequivocal terms as to challenge the attention of our hearers or readers to their exact significance. When this is done, the assumption of the premises is not illegitimate; or, in other words, there is no *petitio principii*. But where our premises are so expressed as to entrap our hearers, and perhaps ourselves, into admissions that we would not deliberately make, the fallacy takes place. Hence the first step in reasoning is the careful consideration of our first principles, with a view of determining whether we are prepared deliberately to assert, and others, to admit them. And in this process, as in the case of agreements generally, there is in fact no agreement unless each party understands what is in the mind of the other, and both fully appreciate the significance of the matter agreed upon.

The most usual and formidable form of this fallacy is that of using question-begging terms; which consists, either in including in the formal definition of a term some unproved assumption as being of the essence of the conception denoted, or—without including such assumption in the formal definition—by using the term as though such assumption were implied. By this method the propositions from which our conclusions are to be deduced, instead of being proved as they ought to be, are unconsciously imbibed by the mind with the definition, or with our conception of the term, and the conclusions thus in effect assumed. In this way, in fact, nearly all modern writers proceed, and, either consciously or unconsciously, seek to inculcate their opinions about the State by including them in their definitions of the term—thus assuming, without any attempt at proof, their own fortuitous conceptions as part of its essential nature. And thus the idea or concept of the State, in itself extremely definite and simple, has become to be so obscured by the extraneous notions thus attached to it, as to render it almost impossible to perceive its simple essential features.

The power of this method of persuasion is well understood by many, and unscrupulously used; (*a*) but, with the mass of writers, the fallacious process, though none the less effective, is entirely unconscious. Hence, if we would avoid error, the necessity of a scrupulous attention to the definition of terms; which is the essential condition of correct reasoning. For to the lack of this nearly all the errors in political and moral science

by which mankind are afflicted can be directly traced.* Hence, the rules of definition constitute perhaps the most important part of logical doctrine, and too great care cannot be expended on their application.

These rules, though generally neglected, are extremely simple in their nature, and to some of them we will briefly refer:

The use of a definition in logical discourse is merely to ascertain and determine the sense in which the term defined is to be used; or, in other words, the whole office of a definition is simply to describe the class of objects denoted by the term. In effecting this, the definition must, to some extent, disclose the nature of the thing denoted by the term, but it does so only to the extent necessary to fix the meaning of the term; and beyond this, it is not any part of its function to express the nature of the thing denoted.

Another obvious rule is that, while it is necessary for the definition of a term to contain enough to distinguish or define the class of things denoted by it from all other classes of things, it is almost equally important that when this is effected it should contain nothing more. In other words, a correct logical definition, to use the technical expression, must be *per genus et differentia*—that is to say, it must specify the general class to which the species of things denoted by the term belongs, and the essential characteristics by which this is distinguished from other species of the genus, or, in other words, the specific difference; and the last, *i. e.*, the specific difference, should contain only sufficient characteristics to distinguish the species, and no more. Having stated the essential characteristic necessary to distinguish the species, all others may be demonstrated, or proved by evidence; and it is therefore illegitimate to assume them.

Another rule—which will complete the list of those necessary to be referred to here—is that the words used in the definition should be more clear, or more susceptible of definition than the term defined. Or, in other words, that we do not fall into the error of trying to explain the unknown by something still more unknown (*Ignotum per ignotius*).

(2) The above rules have been habitually violated in the definitions given us by political writers; and the result has been that the fallacy under consideration, and especially that form of it which consists in the use of question-begging terms, is one of the most fruitful sources of political heresies. A conspicuous instance of this is furnished by Austin, whose theory, as we have observed, is wholly deduced from his assumed definition of the law; which in turn derived its plausibility from the ambiguity of that term in our language, in denoting at once *lex* and *jus*. But in the current definitions of the State, we will find equally conspicuous, and perhaps even more dangerous examples of this fallacy.

*As Hobbes says: "A man that seeketh precise truth had need to remember what every name he uses stands for, and to place it accordingly, or else he will find himself entangled in words as a bird in lime twigs; the more he struggles, the more belimed."—*Lev.*, pp. 24, 25.

Among these one of the most remarkable is the definition of Bluntschli and his American followers, already adverted to; which defines the State as an "organism," or as "an organic being," having a soul and body, a will, a conscience, and active organs, and, in the opinion of Bluntschli, even as being of the masculine gender. (*b*) This is obviously an extreme violation of the third of the rules above specified, which demands that the words used in the definition should be clearer than the term defined. Here the term, "organism," is used in an entirely new sense, which is not defined, and which it is extremely difficult to define. It vaguely suggests that there are, in the nature of man, certain principles of action, from which result certain characteristics of the State similar or analogous to those characterizing natural persons. But what these elements of human nature and resulting characteristics of the State, in fact, are, can only be determined by extended and laborious observation; and, even when determined, they do not properly enter into the definition, but belong rather to the theory of the nature of the State—the subject of our future investigations; or, in other words, to the sequel, rather than to the beginning of our discourse.

Another example of vicious definition is given us by a late American writer, who assumes, among "the peculiar characteristics of the organization which we term the State," numerous qualities that may, or may not, belong to it—and which, at all events, do not properly belong to the definition—and among others the possession of absolute and unlimited power.

"The State," he says, "is sovereign. This is its most essential principle. . . . . What now do we mean by this all-important term and principle, 'the sovereignty?' I understand by it original, absolute, unlimited, universal power over the individual subject and over all associations of subjects."* This indeed is but an expression of the prevailing doctrine of sovereignty, which has already been fully considered. It is again alluded to simply for the purpose of observing, that whether true or not, the proposition has no place in the definition of the State, or among the postulates or axioms of political science. If the proposition be construed as referring to the actual power or might of the State, its truth or falsity is to be determined by historical evidence; or, if it refer to the rightful power, or right of the State, by the principles of jurisprudence, or right. In either case, if true, it can be proved, and hence, to assume it in the definition, or otherwise without proof, is an illegitimate assumption; or, in other words, a *petitio principii*.

Numerous other instances of the same fault occur; some of which are referred to in the note.

(3) The above review of the current definitions of the State (though I fear somewhat tedious) will serve to guard us against errors into which it seems men are peculiarly prone to fall. Thus guarded we will find no

* *Political Science*, etc., Burgess, Professor of History, Political Science and International Law, Dean of the University Faculty of Political Science in Columbia College. Vol. i, pp. 51, *et seq.* (*c*)

difficulty in arriving at a correct and satisfactory definition of the State, the conception of which is extremely simple.

Proceeding according to our logical rules, the first step—which is without difficulty—is to determine the *genus*, or superior class of which States constitute a *species*. This *genus* obviously consists of societies or associations of men. Of these some are natural—such as the family, the tribe, the city, etc., and others voluntarily formed, or, as they may be called, artificial, such as associations for business, charity, religion, or any other purpose that men may desire to pursue in common. Here we have to do with the former class only, or natural societies, and it will be understood we always use the term in that sense.

Of societies of this kind, there are numerous varieties, as for example, single families, patriarchal families, or clans (*gentes*, γενή), village communities, or wandering tribes, cities, or associations of villages, feuds, and States composed of feuds, national States, or States of the modern European type, empires, federal States, independent and subject States, and many others; and to complete our definition, our only task will be to determine which of these shall be included, and which excluded, and to ascertain the specific difference of the State accordingly.

Here the first and most important difference is between societies that exist separately or independently, and those which form part of superior associations. The latter are merged in the higher associations, of which they become part, and thus cease to exist independently. This process has, in the history of mankind, gone on naturally and inevitably until all other associations have finally merged into and become part of a State; and in this manner, as Aristotle lucidly explains, the natural generation of the State has taken place. The State, therefore, is the only autonomous, or independently existing human society, and this may be taken, therefore, as constituting the specific difference, or at least an element of the specific difference of the *species* we call the State. Whether any further element is required to complete the definition is next to be considered.

In defining a term we must, as far as possible, conform to usage; but the term "State," as commonly used, varies somewhat in meaning, and our definitions of it may, therefore, vary, accordingly as we give it a greater or less extension. But in its most general sense the term may, with propriety, be applied to all autonomous societies, and the State may, therefore, be defined as an autonomous society of men. And this is the sense in which I propose to use the term.

Others, however, would restrict the definition so as to exclude some societies of this kind. Thus, a late writer—founding his opinion upon what I conceive to be a misinterpretation of the views of Aristotle—would exclude from the definition of the State, the *gens*, the village community, the tribe, and in fact all other associations historically anterior to the city.*

* *The City State*, by W. Warde Fowler, M.A., Fellow and Sub-Rector of Lincoln College, Oxford. The mistake of Mr. Fowler results from his not bearing in mind that the peculiar subject of Aristotle's treatise is the city (πολίς), and not the State generally.

Again, a late American writer, Dr. Mulford,* deliberately adopts the term, "nation," in place of the term "State," and in this he is followed by the authors of the work on *Politics* already referred to. (*b*) This, of course, would be unobjectionable were it intended simply to distinguish the nation as one kind of State, instead of using—as seems to be their intention—the former term in the place of the latter as better expressing the conception denoted by it. But this is, in effect, though perhaps unconsciously, to exclude from the definition of the State, not only the village and the tribe, but also the city, which, with the Greeks and Romans, was for a long time the only form of State existing. But obviously this conception of the State, as well as that of Mr. Fowler, is too restricted. For though in modern times, when we use the term, the form of State we generally have in view is the modern national European State, yet we also habitually apply the term more extensively; and to give it the more restricted meaning would be in conflict with Aristotle's principle, now almost universally accepted, and which is undoubtedly the fundamental fact of political science, that "man is a political animal," and therefore necessarily always a citizen or member of a State, or, in other words, that he cannot exist in a stateless condition; for according to this notion before the city there was no State. We must, therefore, regard all autonomous human societies as constituting States, and include in the definition all the several kinds of such societies enumerated above, except the single family. This we exclude simply because, in no period of history known to us, has the single family existed independently; but even with regard to the family in its simplest form, as consisting merely of man and woman, this also, if we could conceive of it existing independently—as, for instance, in the case of Adam and Eve in Paradise—might, with propriety, be called a State, or at least a State in embryo.

Again, it is a very common error, resulting from the general reception of the delusive doctrine of sovereignty, that a society in order to constitute a State, must be *entirely* independent of all external control; and this absolute independence is regarded as an essential element of the definition. But this is certainly opposed to common usage, according to which we speak of *subject*, as well as of independent States, and of sovereign, and semi-sovereign States.

And though, of course, within certain limits, men are at liberty to vary in their definitions, yet the definition contended for would be, not only inconvenient, but unscientific. For history, in the past, and in the present, presents us with numerous examples of subject States—societies in which the dependence is so slight as not materially to affect the character of the society as a State—as, for example, the several States once wholly subject to Turkey, but afterwards independent in all respects, except in that of paying tribute. The definition I have given would, therefore, seem to be not only more in accordance with usage, but in all respects preferable.

* *The Nation, passim.*

There is, indeed, some difficulty in determining what amount of dependence would be sufficient to deprive the dependent society of title to the name of State; but this difficulty occurs throughout all the departments of natural history—as, for instance, is illustrated by the difficulty in determining where vegetable life and where animal life begins; and is, therefore, no objection to the definition; in which the principle of distinction is the simple consideration, whether the society in question has an independent existence, or exists simply as a part of some other society or State. This question, though in some cases difficult, is, in general, easily to be determined.

I define a State, therefore, simply as an autonomous society of men. By "autonomous," I do not mean complete and absolute independence of external control, but simply such degree of independence as is inconsistent with the notion of the society referred to being an integral part of another State. And it may be added that by the term "society" a certain degree or kind of permanence is necessarily implied. For the term itself, according to its etymology, and also according to its habitual use, denotes an aggregation of companions or habitual associates.

In this definition, we have omitted an element almost universal, namely, the permanent occupation of a common territory. This, however, cannot be regarded as an essential element of the notion of the State; which may be conceived, and has in fact existed in a migratory condition, as for instance, the Israelites in their wanderings, and the German tribes prior to their settlement. Indeed, in the history of the race the first principle of association is that of kinship, and it is by this principle that the State is first recognized and determined; the influence of the common territory in determining the State is of later origin. But such a condition can exist only in primitive times, and we may, therefore, without error, leave it out of view and regard the permanent occupation of a common territory as an element in the definition. In other words, in our investigations, we may confine our consideration to the subject of territorial States.

A still more important omission from the definition seems to be that the element of government is apparently omitted. History nowhere presents us with a society of men absolutely without government or political organization, and we might, therefore, confining ourselves entirely to the facts historically known to us, include this element in our definition. But this would be to violate the rule that the definition of a term should contain no more elements than are necessary to define the class denoted; as, for instance, as if we should define a triangle as a three-sided figure having three angles. The State being thus defined, it may be conclusively inferred from the nature of men, as known to us in history, and otherwise from experience, that in every State the fact of government must, so far as our experience goes, also exist. But it is possible that in prehistoric times men existed without government, and that, in some higher state of human development in the future, government may be-

come unnecessary. I prefer, therefore, to regard government or political organization not as an essential element, but as an inseparable accident of the State. No material error will be involved, however, in including it in the definition, and in deference to common usage and for convenience otherwise, the State may be defined as an "autonomous politically organized society;" or, as Austin defines it, "an independent political community."

Thus defined, States may be variously classified, either historically, as the primitive village or tribe, the ancient and the mediæval city, the feudal State, the modern national State, etc., or logically, as subject and independent States, or as simple and complex States, etc.

Of the last an instructive example is furnished by the feudal regime; in which the several feuds, each in itself a State, constituted in effect a federal State. Historically, this system is a subject of capital importance, and deserves the most careful consideration, but, except for purposes of illustration, will not be considered in this work.

To us a much more important example of the complex or composite State is presented by what is called the federal State as developed in modern times—a subject of extreme interest, and to which we must devote a somewhat extended consideration.

Before passing to this, however, it will be observed that our definition does not include leagues or confederations of States. These, indeed, are political societies, but of States, not of men, and more properly, therefore, fall under the subject of the external relations of States. They, however, constitute a most important subject for consideration; and perhaps in them alone is to be sought the realization of what the Germans call the "*idea*," as distinguished from the "*concept*" of the State, and which is to be realized only in the "*world-State*."

§ 13. *Of the Federal State.*

A federal State, instead of occupying exclusively a certain territory, in fact occupies the territories of the constituent States, out of which it is formed in common with those States; and thus the people which constitutes it consists of the peoples of the several States, regarded for certain purposes as one people. It differs essentially, as we have observed, from a federation, which is a mere league of States, and in which the community constituting the confederacy consists of States, and not of men; while a federal State is not a community of States, but a people, precisely as in the case of a simple State. On the other hand, the federal State, as well as its constituent States, differ from the ordinary, or simple State, in this, that the powers of the former as well as those of the latter are each definitely limited; or, in other words, the sovereignty, or aggregate of the sovereign, or supreme political powers, is divided between the federal and the constituent States; so that each is sovereign in the definite sphere of political action allotted to it, and no further. Hence, in a federal

union, there are always several communities or peoples occupying a common territory, namely, the community or people of the federal State, and the communities or peoples of the several States; and thus, in each of the constituent States, there are two peoples or communities, consisting of the same individuals, or rather, one people or community and part of another; that is to say, the people or community constituting the constituent State, and the part of the federal people or community occupying the same territory.

Of this kind of State, the most instructive instance is that of the United States of America, the general nature of which is sufficiently familiar, and from which our description of the federal State has, in effect, been taken; and which we will further consider. Briefly, this State was voluntarily formed by several independent States, upon the principles agreed upon and inserted in the Constitution; which thus constituted, not only a national Constitution, but a contract or obligatory agreement between the several States. By the provisions of that instrument, certain powers were conferred upon the federal government, and it was expressly provided, that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."* Hence, the obvious distinction, universally recognized by all competent jurists and publicists, between the federal constitution and those of the several States; the former is an express grant of powers to the federal government, which is vested with no powers except such as are granted to it, either expressly or by implication; the latter is a mere limitation upon the general sovereign powers vested in the State. Hence, it follows that each government is paramount, supreme or sovereign with reference to matters within its own sphere of rights; but any act of the federal government, or of a State government, in excess of its powers, is absolutely void, and may be disregarded, not only by any State or by the federal government, but by any individual. Hence, also (which is but another statement of the same proposition), the sovereign or supreme political powers are divided between the federal and the State governments, each being sovereign in its own sphere. All this, though often ignorantly disputed, has uniformly been asserted by the Supreme Court of the United States, as well as by jurists generally, and, as is well known to all lawyers, is the established law of the land. (*d*)

This view of the nature of the federal State is at once simple and entirely rational, and, it may be added, is the view generally entertained by American lawyers and jurists of all political faiths. But, outside of the legal profession, it is generally repudiated by American writers north of Mason and Dixon's line; and the opposite doctrine—namely that the federal government is alone supreme, and the States entirely subordinate—is generally received among the writers of that section of the country, and has in fact colored, not only their political, and even their histori-

*Const. U. S., Amend. XII.

cal writings, but their whole literature. This view has also become a matter of popular faith with the members of a great party ; to whom the very name of States rights is offensive—and it is also very largely, if not generally, received among European publicists. On this account, if not for its intrinsic merits, the opinion demands, and will receive a critical examination.

The opinion in question rests wholly upon the doctrine of absolute sovereignty, which has already been considered at length ; and from which, it must be admitted, the conclusion is logically deducible. For if it be true that the sovereignty is unlimited and indivisible, and that it is vested in the federal government, it follows that a federal State is at once a practical impossibility and a logical absurdity.

For obviously, in general, no State would ever be willing to enter into a federal union, if the doctrine be recognized that by doing so it would part altogether with its sovereignty, and subject itself to a foreign domination, and that too, according to the assumed doctrine, a domination absolute and unlimited in its nature. Certainly, had such a doctrine been broached in the constitutional convention which framed the federal constitution, the federal union would never have come into existence ; nor can it now be asserted without violating every principle of good faith.

But independently of this, the doctrine is logically absurd ; for if it be assumed that the sovereignty is indivisible, it would follow that, in every so-called federal union, it must be vested exclusively, either in the federal State, or in the several constituent States, and that the former must be subordinate to the latter, or the latter to the former. But obviously, upon the former hypothesis, the union would be a mere confederacy, or league of States ; and upon the latter, it would differ in no essential particular from the ordinary or simple State ; for in such case the subordinate States would be nothing more than mere municipalities, such as universally exist in all States.

It would be an endless task to enumerate all of the disastrous consequences that have resulted, not only to political science, but to the practical interests of men, from this purely fictitious notion of sovereignty ; but the subject may be sufficiently illustrated by observing, in connection with the present subject, that from this doctrine—the fruit of a question-begging term—there has resulted, in our own history, nearly a century of bitter conflict, ending in four years of destructive war, and, it is to be feared, in the permanent alienation of the two sections of the country. For, upon the assumption that sovereignty is indivisible, a proposition accepted by both sides, it is clear, as we have observed, that either the federal government is sovereign, and the States subordinate, or the States sovereign, and the federal government a mere league or compact ; and, as both propositions are equally untenable, it was impossible, in the long controversy between the North and South, for either party to be convinced, and nothing was left but the arbitrament of arms. It may be

said, therefore, that the great civil war was but a logomachy, or fighting about a word.

Other causes doubtless concurred in bringing on the war, such as slavery and the tariff; for it cannot be doubted, on the one hand, that, with those in the South who owned slaves, the protection of their property was a strong motive, or, on the other, that, with a large, wealthy and influential class at the North, the preservation of a market was an equally controlling consideration. But no one who is familiar with the history of the contest, and especially with opinion and sentiment, as it existed both at the North and the South immediately before the war, can doubt that the paramount issue in the minds of the great mass of honest people was the relative supremacy of the federal and the State governments, or that this question originated in the absurd *doctrinaire* notion of the indivisibility of sovereignty, or, in fine, that this notion was the ultimate cause of the war.

§ 14. *Of the Historical Origin of the State.*

The subject of the historical origin of the State—which must not be confounded with what may be called its *causal* origin, or *raison d'être,* or cause of existence of the State—a very different subject—is one of great interest; but its consideration does not belong to the theory of the State, except in so far as it may serve to illustrate or verify the principles involved in the discussion. A brief consideration of it will therefore be sufficient.

With regard to modern States, we are, in general, able to trace back the history of each to its origin; but this is not true of the ancient States, whose beginnings are shrouded in the mists of antiquity. All, therefore, that we can know of the origin of the primitive State, with the exception of a few historical facts, is confined to such inferences as may be drawn from the nature of man; but from this, the general course of the original genesis and development of the State is sufficiently obvious. The primitive society is the family; and out of this, even in the absence of other supervening causes, must inevitably grow, as from a germ, the larger society, which we call the State, whether the village or tribe, the city or the nation. Other causes may indeed concur in the development of the State, the chief of which is war or conquest; but without these the same course of development must inevitably take place.

§ 15. *Of the Causal Origin, or Raison d'Être of the State.*

Hence, therefore, passing to the *causal* origin, or *raison d'être* of the State, it is evident that it does not need the refined hypothesis of a social contract, or of direct divine appointment, to justify its existence, but it is to be regarded as a naturally existing phenomenon, in the same sense as man himself exists. Hence, also, it seems to be an absurdity to speak, as many do, of "the State of nature," as opposed to the social State; for the social State is, in fact, the natural State of mankind, and the State of

nature but another name for it. The term is, indeed, very commonly used to denote what may be more properly called the anarchic State, or society without government; but in this sense it denotes a purely fictitious idea, which has probably never existed, and which, unless human nature becomes radically improved, can never exist. For it is evident from the most superficial observation, that the nature of men is such as to impel them, irresistibly, to live in society, and that in order for them to do so government is essential. Hence, as rightly defined by Aristotle, "man is by nature a political animal" (*ἄνθρωπος φύσει πολιτικόν ζῷον, Pol.*, i, 2, § 9); in which principle we have the cause of the genesis, and continued existence of the State; the end, or at least the effect of which is, to secure the existence of the conditions necessary to the life and to the welfare or happiness of man. Or, as expressed by Aristotle, "the State is first founded in order that men may live, but continued that they may live happily." Hence, we may admit with Burke, that the State "is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature," but "a partnership in all science, a partnership in every virtue, and in all perfection."*

§ 16. *Of the Distinction Between the State and the Government.*

But in accepting this proposition, it is necessary to distinguish carefully between the State and the government. Government, or political organization, is a necessary and perhaps essential part, but not the whole of the State. Outside of the government there is *the people*, for whom the government exists, and for whom all political power is held in trust. The State, therefore, must be conceived as consisting of the government and of the people. The end, and the corresponding function of the State, is to promote the happiness or well-being of the people in every respect; but the agencies by which this is effected are twofold; namely, by government, which is organized force, and, without the intervention of government, by the natural influence of men upon each other, and by voluntary coöperation. Hence, the end, and corresponding function of government is not coextensive with that of the State; and the proposition we have asserted of the one cannot be accepted as true of the other. We must then next inquire in what the necessity of government consists, or, in other words, its *raison d'être.*

§ 17. *Of the Causal Origin or Raison d'Être of Government.*

While man is irresistibly impelled to live in society, there exist also in his nature certain anti-social tendencies, which, unless restrained, are irreconcilable with the existence of social life. These result from the undue empire of the self-regarding principles of his nature, which in general

*The reader will perhaps recognize the last observations as taken from Sir Frederick Pollock's *History of the Science of Politics*, No. 42, Humboldt Library, pp. 49, 50. But, as will be seen, this must not be taken as indicating any very considerable identity of our views in general.

overmaster his regard to the well-being, and even to the rights of others. Thus, in the absence of restraint, he is, by his own evil desires, and from the fear of like treatment from others, almost irresistibly impelled to invade and attack his neighbors, and by means of force or fraud to subject them to his own power, or, in the expressive language of the law, to convert them and their property to his own use. Hence results the necessity of government: without which there would necessarily exist a universal and continuous conflict between men, which it would be no exaggeration to call, with Hobbes, a condition of permanent war of "every man against every man."* Hence, we may conclude with him, that "the final cause, end, or design of men, who naturally love liberty (in themselves), and dominion over others, in the introduction of that restraint upon themselves in which we see them live in commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war which is necessarily consequent to the natural passions of men when there is no visible power to keep them in awe."†

But in agreeing with Hobbes on this point, it is not necessary for us to accept also his psychological theory (in which he is followed by Bentham and Austin), that men act always from selfish motives, and are incapable of any other. The sentiments of benevolence and justice, though less strong, are as really principles of human nature as is regard to one's own interest. In this respect, the views of Mr. Calhoun are more just, yet equally sufficient to establish the conclusion reached. The question and the solution of it is thus stated by him:

"What is that constitution of our nature, which, while it impels man to associate with his kind, renders it impossible for society to exist without government?

"The answer will be found in the fact that, while man is created for the social State, and is accordingly so formed as to feel what affects others, as well as what affects himself, he is, at the same time, so constituted as to feel more intensely what affects him directly, than what affects him indirectly through others; or, to express it differently, he is so constituted, that his direct or individual affections are stronger than his sympathetic or social affections. I intentionally avoid the expression, selfish feelings, as applicable to the former, because, as commonly used, it implies an unusual excess of the individual over the social feelings, in the person to whom it is applied, and consequently something depraved and vicious.

"But that constitution of our nature which makes us feel more intensely what affects us directly than what affects us indirectly through others, necessarily leads to conflict between individuals. Each, in consequence, has a greater regard for his own safety or happiness, than for the safety or happiness of others, and, where these come in opposition, is ready to sacrifice the interests of others to his own. And hence the tendency to a universal state of conflict between individual and individual; accompa-

* *Lev.*, Chap. xiii. † *Id.*, Chap. xviii.

nied by the connected passions of suspicion, jealousy, anger, and revenge —followed by insolence, fraud, and cruelty, and, if not prevented by some controlling power, ending in a state of universal discord and confusion, destructive of the social State, and the ends for which it is ordained. This controlling power, wherever vested, or by whomsoever exercised, is government.

"It follows, then, that government has its origin in this twofold constitution of our nature: the sympathetic or social feelings, constituting the remote, and the individual or direct, the proximate cause."*

§18. *Of the So-called Organic Nature of the State.*

As the State is but a certain kind of aggregation of men, it is clear that the nature of the State, as well as its genesis, is determined by, and must be sought in the nature of individual man.(*e*) Proceeding on this principle, we investigated, in a preceding section, what we called the *causal* origin, or, as it may be called, the *genetic*, or generating cause, of the State; and this we have found to consist in certain traits of human nature, which may be called social, that irresistibly compel men to live in a State of society; and hence, that the State is to be regarded as a natural phenomenon, that—given the existence of man—must necessarily exist. Which indeed might have been inferred from the term itself, which—according to the etymology—signifies nothing more than a *state*, or *condition* of men. In like manner, we also investigated the *causal* origin of government; which we found to consist in certain traits or tendencies of human nature (which may be called anti-social), that render political organization a necessary condition to the existence of society. In solving these problems, we have necessarily, to a certain extent, ascertained the nature of the State; that is to say, we have ascertained it to be merely an autonomous society of men, always existing under a political organization, or government; and from these propositions—meagre as they are—some negative inferences may be drawn, that will, at least, serve to dissipate more effectually certain false notions of the nature of the State, already touched upon, and thus to preserve us from error.

The State being a mere aggregation of men, living under certain conditions, cannot, strictly speaking, be said to have intellect, or conscience, or will, or consciousness, or power, either in the sense of right or might, or any human quality, moral, mental, or physical; nor can it be regarded as an actual individual being, or as having an actual independent existence. Like other collective terms, such as army, church, family, *gens*, race, etc., the term denotes merely a certain number of human beings, aggregated in a certain way; and hence, all human qualities and acts ascribed to the State, or to the government, are in reality merely qualities

* *Disquisition on Government*, 5. This is justly described by Mr. Mill as "a posthumous work of great ability;" and the author as "a man who has displayed powers, as a speculative political thinker, superior to any who has appeared in American politics since the authors of *The Federalist*" (*Representative Government*, p. 329).

or acts of the individual men composing it, or of some one, or more of them. It is, for example, as impossible to conceive of a single will or conscience, made up of the wills of several individuals, as it is to conceive of a single man made up of several. The problem of the nature of the State, therefore, is simply the problem of the nature of the individual man in his social relations.

Yet, such is the nature of men, when brought together in society, that a certain unanimity of moral judgment, and of opinion in general, and a corresponding unity of action, always result; as is exhibited in every sphere of social life: in the family, in the associations of friendship, in general society, in business relations, and, finally, in the greater society we call the State. This unanimity, in a certain degree, is in fact essential to the social existence of men, and in this case, as in others, nature has provided for it by endowing men, more or less perfectly, with qualities necessary to produce it; such as reason, and perhaps instinct, the affections, and benevolence generally, and justice, and especially the disposition to conform to the general opinion and conduct of the community, or, in other words, to *authority* and *custom;* which are the instruments by which the intelligence and conscience of the community most effectually assert their authority.

This tendency to unanimity of thought and action permeates all the different spheres of social life, from the family to the State inclusive; and under its action there are developed, as it were, naturally and automatically, certain principles or rules of conduct, by which men are governed, and to which they voluntarily conform their conduct. Of this nature are the rules of society, the laws of fashion, the laws of honor, etc.; all of which strongly illustrate this natural tendency of mankind, in all spheres of society, to evolve involuntarily, and almost unconsciously, some common standard of thought and action to which they voluntarily conform. But of this tendency the most conspicuous and important example is furnished by its operation in that largest of all social spheres—the State. And of this the results are threefold, viz.: as affecting questions (1) of justice, (2) of morality generally, and (3) of expediency and propriety; with reference to each of which there is evolved, in every State, under the influence of this natural tendency of men, a body of opinion and sentiment in which all, or nearly all, concur. Of these results the first constitutes—as we shall see—the Law or Positive Right of the State; which in reality constitutes a part of Morality, but is distinguished from morality generally by the fact that it constitutes the principal and sole essential end of government. The second constitutes the *Positive Morality* of the State; and the third is what is commonly spoken of as *Public Opinion;* of which that which relates to political matters, or *Political Opinion,* mainly concerns us here.

The nature of this consensus of moral convictions, the method of its genesis, its rightful authority, and the instrumentalities by which it is enforced, though a subject of fundamental importance in jurisprudence,

and in politics generally, is too extensive to admit of adequate discussion here; but the following brief statement of the principles applying to the subject will, perhaps, be sufficient for our present purpose. (*f*) There is in some way generated in every man, as it were, a code of moral convictions, or principles, by which, in ordinary cases, he instantaneously, and without reflection, judges his own actions and those of others to be right or wrong. There is also in every man a faculty—whether innate, or acquired, it is unnecessary here to inquire—by which he perceives the duty or moral necessity of conforming to the right; and this conception is accompanied by sentiments of approbation or disapprobation with regard to his own actions and those of others, and with regard to the former, the sentiment of conscious rectitude or remorse. The combination of these moral convictions, with the faculty of perceiving the duty of conforming to them, and the accompanying sentiments, together constitute what is called conscience—the existence of which, whatever difference of opinion there may be as to its nature, cannot be denied. It is this which constitutes to every man the proper standard or test of right and wrong by which his conduct —at least with regard to matters concerning himself alone—is, or ought to be, governed.

Men, however, acquire their moral convictions to a great extent from education and association with others; or, in other words (as indicated by the etymology of the term "morality" and kindred terms), from custom; and this is to be regarded, not as accidental, but as the result of the law of his nature. Hence, every aggregation of people have a morality, to some extent, peculiar to themselves, and the moral principles of one age or nation are somewhat different from those of another. But under all these diversities there is always a substantial conformity with respect to fundamentals, and especially, in every nation or people, there is always a body of moral principles, universally or almost universally recognized, which becomes embodied in the language and habitual thoughts of the people, and wrought, as it were, into the conscience, o every individual. It is this which constitutes the positive or received morality (*mores*) or, as the Greeks call it, *nomos*, of a nation or people; and it cannot be doubted that in all questions of common concern it should be held to be of paramount authority; and this for three reasons. For, first, the positive morality of the present age is the result of the never-ending struggle of mankind to realize theoretical morality—a struggle to which, from the beginning of history, the highest intellect and conscience of the race, have been consecrated—and it, therefore, carries with it the strongest presumption of its truth; secondly, no reason, except, where applicable, that of necessity, can be assigned why the conscience of one man or set of men should be forced upon others of different convictions; and, hence, in political affairs, there is no alternative between the acceptance of this standard, or of submission to arbitrary power; and hence, also, free government is possible only to the extent that this general conscience, or *consensus* of moral conviction, is developed; and,

thirdly, men, as it were, by some instinct of their nature, in fact involuntarily, accept and submit to this test as a standard of practical morality; for, as is well observed by Mill, "the customary morality, that which education and opinion have consecrated, is the only one that presents itself to the mind with the feeling of being in itself obligatory." (*g*)

All this is especially true with reference to that part of Morality that deals with Right, or, in other words, Jurisprudence—the peculiar matter with which government is concerned; with reference to which it may be asserted that the general conscience or positive morality of the community is, in fact, ultimately, and in the long run, the paramount, predominating political force in the civilized world; that it is this alone that makes civilization possible; and that in the superior development of the sentiment of rights is to be found the essential difference by which modern civilization is to be distinguished from that of the ancient world, and of inferior civilizations generally; and finally, as in the past, that all future progress in political civilization must consist in the development and perfectionment of this sentiment.

Summarizing these results, it will be observed, that the genesis, the continued development, and the action of the State is, to a large extent, automatic; but, not wholly so. The State must exist; and so far, it may be said, its genesis, and its continued existence is a natural phenomenon; and it may be said also that its gradual development is largely of the same character. But both in its original creation and subsequent development, conscious, human agency concurs, and with advancing civilization, in an increasing degree. So also, with regard to the conduct of the State, this, while to a large extent automatic, is, also, to a large extent, determined by conscious human agency. Hence, arises the obvious distinction between the functions of the State that are automatically performed, or, more briefly, its automatic functions, and those that are performed by the conscious agency of men; the latter of which may be called *political*—as being performed by government—and the former, *non-political*.

Government, as we have observed, is, so far as our experience or observation goes, an invariable element in the form of the State, or, in other words, the State has always manifested itself to us as politically organized; and this may be assumed, therefore, as its normal character. In this aspect, the State—*i. e.*, the politically organized State—is to be regarded —as we have heretofore observed—simply as a large corporation, or body politic, differing in no essential particular from private corporations, except that it is not, as in other cases, merely the result of human volition, but to a large extent a natural growth, and, at least, to the extent of its existence, a natural and, therefore, a necessary phenomenon. Hence, we may regard the State, politically organized, as a fictitious, or imaginary person, or being; and this conception will be found extremely convenient, and, provided we bear in mind that it is a pure fiction, also safe.

Indeed, it is difficult, and perhaps impracticable, for us to dispense with this mode of expression. For it is impossible not to recognize, or at,

least, not to imagine we recognize, in this "our artificial man"—as Hobbes calls him—the familiar lineaments and qualities of an actual man, or to refrain from thinking and speaking of him accordingly. And to this usage, properly guarded, no objection can be made. For so numerous and striking are the resemblances, or rather the analogies, between the State and the individual man, that the most convenient, and therefore the most natural, way of describing the qualities and actions of the former, is to apply to them the terms we use with reference to the latter. Accordingly this has become the settled usage of our own and other languages, from which, even were it otherwise desirable, it is now too late to depart.

This usage is indeed in some respects extremely misleading and dangerous; but the same is true of language generally; throughout which the same method of expressing mental conceptions by terms originally appropriate only to physical objects universally prevails; and hence, out of such analogies, arises the wonderful power of fallacy—or, to be more accurate, the wonderful *fallacy-producing* power—contained in words—a power unsuspected by the multitude, but recognized by all profound thinkers, and practically illustrated in the most conspicuous and striking manner, by the justly distinguished writers we have reviewed; and which we will, again and again, have occasion to observe in the further progress of our inquiries. But fortunately, against this power, it is practicable for us effectively to guard ourselves by simply observing, and always bearing in mind, where we use a word in a transferred sense, that it is with an essentially different meaning from that originally denoted; and that the resemblance between the conceptions denoted respectively by the secondary and the original senses of the term is not a resemblance of essential nature, but a mere analogy; which may be useful in suggesting, but is incapable of accurately expressing the conception denoted by the former.

Hence we may, without impropriety, and, bearing in mind the above caution, without danger, apply this usage to the State, and speak of "its will," or "its conscience," as though it were a man; and, indeed, in the present state of language, it is difficult otherwise to express ourselves. But in fact these expressions, taken literally, and all theories founded on their literal sense, are without signification, or, in other words, *nonsensical.* For both terms, and other terms expressing human qualities, are strictly relative, and imply, as a correlative, an actual human being in whom to exist.

The two expressions commented upon — "the will of the State," and "the conscience of the State" — when rightly understood, are equally innocent, but it cannot be said that, in their actual influence on political science, they have been equally innocuous. By the former is meant nothing more than the concurring wills of the individuals, or of some of the individuals who possess the political power; but it has been commonly understood in its literal sense, or *non-sense,*

and, as we have seen, has thus given rise to the equally nonsensical, but pernicious, doctrine of absolute sovereignty and other misleading notions. But the expression, "the conscience of the State," or the equivalent expression, "the conscience of the community," or—as I prefer to call it—the "general conscience," while perhaps equally misunderstood, is not susceptible of being perverted to evil uses; and, indeed, its literal sense so strongly suggests the actual fact or phenomenon to which it refers, and which it is designed to express—namely, the received or positive morality of the community—that its use has been almost purely beneficial.

Hence—to conclude—while we may not say that the State is an "*organism*," or an "*organic being*"—for this seems to assert, not as a convenient fiction, but as an actual fact, that the State is an animal—yet we may, without impropriety, say that it is *organic* in its nature—meaning thereby, that its genesis and development, though partly artificial, are, to a large extent, natural, or governed by natural laws; and that its functions, though partly performed by the conscious agency of the men intrusted with government, are also, to a large extent, automatic. And, indeed, I know of no other way to express, in brief terms, these conspicuous and important characteristics of the State. Only, in conforming to this usage, it is always to be remembered that the organic nature of the State is *sui generis*; and especially that it is essentially different from that of an *organism* or living being; with which it has nothing of essential nature in common.

Thus defined, the proposition, that the State is organic in its nature, expresses a profound truth. For, though the State is organic only in the peculiar sense we have defined, and although, even in this sense, the proposition is only partially true, yet it may be that, in some more advanced state of social civilization, it may become wholly so, and that the performance of the functions of the State may become wholly automatic and government be dispensed with.

NOTES.

(*a*) The advocates of the doctrine of governmental absolutism fully realize the truth of the observation of Rousseau, that "the strongest is not strong enough to continue always master, unless he transforms his power into a right . . . . and obedience into a duty" (*Social Contract*, Chap. iii); and that for this purpose no method is so effective as the fallacy in question.

(*b*) *Supra*, pp. 195, 196. See also *Politics*, by William W. Crane and Bernard Moses, Ph.D., Professor of Political Economy in the University of California; who follow Bluntschli and Mulford in this definition.

This use of the term "organism" and the adjective "organic" is purely metaphorical. Provided this be understood, there is no objection to this use of the terms, and they may perhaps be used with advantage, as is done by Krause to distinguish what, as will be seen, I take to be the true theory of the nature of the State. In thus using the term, however, it must be understood that it is used in an entirely new sense, and one essentially

different from that of the term "organism," as denoting animal and vegetable beings. This method of using the term is admirably illustrated by the sober, accurate and able *Cours de Droit Naturel* of Mr. Ahrens; which is avowedly an exposition of *The Organic Theory* of Krause; and in which the author is not misled by the associations of the term, nor indeed, except in one particular, by any of the prevailing delusions as to the nature of the State. With regard to the exception alluded to, Mr. Ahrens appears to be emancipated altogether from the prevailing doctrine of sovereignty, and admits that the power of the State is not only limited, but is also divisible in its practical application; yet he adheres to the notion that it is indivisible in its source, namely, the State, which constitutes the national sovereignty (*Cours de Droit Naturel*, Vol. ii, pp. 359, 360). But this, as we have observed, is also a meaningless assertion.

(c) Thus, one of the characteristics of the State alleged by Mr. Burgess is, that "the State is permanent;" by which, from the context, it appears that he means to assert, either that it cannot, or that it ought not to be dissolved, otherwise than by natural causes. "It does not lie," he says, "within the power of man to create it to-day and to destroy it to-morrow, as caprice may move him." And the same notion is expressed by Dr. Mulford (*The Nation*, p. 6). But if reference be made to the *fact*, nothing has been more common in history than the dismemberment and destruction of nations by external foes, or even by the people of the State itself, and if to the *right*, it is difficult to perceive any grounds upon which we can assert it to be universally true. That in general a State should not be disrupted, is an obvious proposition. But numerous cases have occurred in history in which it may be safely said that the State ought to have been dissolved. Thus, the Roman empire was in fact formally dissolved upon the partition of the east and the west by Arcadius and Honorius, and it is very probable that, had this partition been deliberately made a hundred years before, good results would have followed. And, indeed, it is not unreasonable to suppose that in the decadence of the Roman empire, after its great work had been accomplished, it would have been for the interests of the human race had a more general partition taken place, as for instance, in the west, between Italy and the western provinces, and in the east, between the European and Asiatic provinces. And it is certainly to be hoped that at least one great State of modern times (I refer to Russia) may, at some future period, be dissolved, as otherwise, sooner or later, it will dominate the world.

Other instances of faulty definition, though of less importance, are the following: Sidgwick defines the State, as "a body of human beings deriving its corporate unity from the fact that its members acknowledge permanent obedience to the same government, which represents the society in its collective capacity, *and ought to aim in all its actions at the promotion of their common interests*" (*Elements of Politics*, pp. 211, 212). The last clause, though perhaps true, is not appropriate to a definition, but is to be established by an investigation of the principles of jurisprudence.

Similar faults are also presented by the following definitions; all of them by approved authorities.

"A State, in the meaning of public law, is a complete, or self-sufficient body of persons united together in one community, *for the defense of their rights, and to do right to foreigners*" (Bynkershock, N. J. Pub., Bk. i, Chap. xvii).

"The State (*civitas*) is a perfect (that is, independent) collection of free men associated, *for the sake of enjoying the advantages of right or justice, and for common utility*" (*Grotius*, Bk. i, Sec. 14).

"Nations or States are bodies politic, societies of men united together *to procure their mutual safety and advantage by means of their union*" (*Vattel*, Introduction, Sec. 1).

"The State (is to be regarded) as an association *for the purpose of establishing right*" (*Como la sociedad para derecho*) (Krause, *The Ideal of Humanity*, Trans. of Sauz. del Rio, p. 48).

In all of these definitions the end or duty of the State to provide for the rights and for the welfare of its citizens, is inserted as an element of the definition, to which it is not appropriate. What is the true end or function of the State, is, indeed, an important question, and I do not say that it is not here correctly stated, but to insert it in the definition makes the definition in fact false. For States are formed either by natural causes

existing in the nature of man, inevitably driving him into society, or by force or violence, exercised by men at least with the predominant motive of advancing their own interests.

Again, the definition of Cicero (*Republic*, Bk. i, Sec. 25) is also objectionable: "The State (*respublica*) is the collection of a multitude associated *by a common sense of right and a community of interests.*"

A common sense of right and a community of interests generally result from the establishment of a State; but even if this proposition were universally true, it would not be appropriate to the definition. And, indeed, a State may exist with little or no "common sense of right," or "community of interests," as for instance, the great Asiatic despotisms, and perhaps many European empires.

The definition of Aristotle, who defines a State or city to be "a certain number of *citizens*" (*Politics*, Bk. ii, Chap. i), and that of Austin who defines it "as an independent political society" (*Jur.*, p. 249), are both free from objection, at least in this respect.

(*d*) "In American Constitutional Law, there is a division of the powers of sovereignty between the national and State governments by subjects; the former being possessed of supreme, absolute and uncontrollable power over certain subjects throughout all the States and Territories, while the latter have the like complete power, within their respective territorial limits, over other subjects."—Cooley, *Constitutional Limitations*, p. 2.

"In the case now to be determined, the defendant (in error), a sovereign State, denies the obligation of a law enacted by the Legislature of the Union (p. 400). . . . . The government of the Union, though limited in its powers, is supreme within its sphere of action (405). . . . . (But) Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say such an act was not the law of the land (423). . . . .

"The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States? We think it demonstrably does not" (429).—Marshall, C. J., 4 Wheat., 400.

"The federal government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear, that, while these supreme functions are exercised by the federal and State governments, within their respective limitations, they can never come in conflict, and when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."—License Cases, 5 Howard, 588.

"Although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States, and the powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."—Ableman *vs.* Booth, 21 How., 516.

(*e*) This is well explained by Mr. Ahrens:

"Before him (Aristotle) Plato seized still more profoundly the intimate relation between the man and the State, when he conceived the order of right, as above all, an order which each man ought first to realize in his own internal nature, of which society is always more or less a reflection. For this reason Plato saw in each man a State in miniature ('micropolis'), as he saw in society man enlarged ('writ large'). The same opinion is professed by Krause. . . . . The State, without doubt, ... must always be, in its organization, and in the forces and modes of its activity, the mirror of the interior

and moral state of its members, of the condition, more or less elevated, of their intelligence, of the sentiments and motives with which they are inspired in their actions. As Christ said: 'The kingdom of God is within you;' Plato and Krause say: The State, which ought to realize the divine idea of right, is originally in you" (*Cours de Droit Naturel*, § 105).

(*f*) For this subject the term Nomology, or the science of Nomos, or positive morality (mores), would be an appropriate name. It would treat of both the theory, and the natural history, the mode of genesis, and existing state of positive morality, and of its relation to theoretical morality.

(*g*) "There can be no democratic State, unless the mass of the population of a given State have attained a *consensus* of opinion in reference to rights and wrongs, in reference to government and liberty." There must be a "common custom, and a common consciousness of rights and wrongs" (Burgess, *Political Science*, Vol. i, pp. 81, 82). It will be observed that all modern European States are regarded by Mr. Burgess as democratic.

CHAPTER II.

Of the Functions of the State Generally.

§ 19. *Of the Relation Between the Functions, and the Rights of the State.*

The end of the State, as we have observed, is not only to insure the safety and peace of the individuals that compose it; it extends also to the promotion of their welfare in other ways. But this end, as we have seen, is accomplished, not by means of government exclusively, but also, and perhaps chiefly, by individual action, and the natural influences of society upon men. The functions of the State are, therefore, to be divided into two classes essentially different from each other, viz., the automatic or non-political functions, and the political functions, or functions of government. The former constitute a subject of great importance, which we have already touched upon and will again refer to; but in the present chapter, we will confine our attention to the political, or governmental functions of the State, only; and as these are all exercised by the government, we may, with regard to them, use the term *government*, instead of *State;* which will be found to be the most convenient form of expression.

By the expression, the functions of the government, or the political functions of the State, is meant simply the duties of the government, considered generally, or, in other words, the modes in which the powers or rights of the government ought to be exercised. The relation existing between the functions and the rights of the government is, therefore, obvious. The government is rightfully vested with all the powers necessary to the efficient performance of its functions, and the extent of its rights is to be determined by this necessity. On the other hand, the exercise of any function by the government is the assertion of an assumed right, and can be justified only by establishing the right. The question of *function* and the question of *right* are, therefore, so closely implicated that the one cannot well be considered without touching upon the other.

The two questions, however, are not to be considered as identical; for obviously the rights of the government are more extensive than its functions; for the functions, or duties of the government, under different circumstances, are infinitely various, difficult to determine and admitting of great variety in the mode and means of performance; and hence, to enable the government to perform them, there must be vested in it the power, or right, to determine what its duties are, and the times, modes and means by which they shall be performed. And, while it is the duty, or function, of the government to act wisely, and with the single view to the good of the people, yet, obviously, the power to decide necessarily

implies the power to decide erroneously, or even dishonestly. For the question here is, as to the extent of the power with which it is necessary to vest the government, in order that it may be able to perform its functions efficiently; and when the extent of its power or right is thus determined, no act of the government within the limit of its right, can be held unlawful, however erroneous in fact, or criminal of intent, it may be.

Thus—to make use of an illustration already used—it is the function of the judge to administer justice; but his jurisdiction, or power, is "to hear and determine the subject in controversy;"* and this obviously implies the power, or right, to decide erroneously, and even unjustly. Hence, judgments depend for their validity, not upon their being correct, but simply upon the jurisdiction, or right of the court, to determine the cause. Hence, it has been wittily and truly said, referring to the definition of jurisdiction, "as power to hear and determine," that, "it is in truth the power to do both, or either—to hear without determining, or to determine without hearing."† In the same way, the validity of all the acts of government, like that of the acts of private individuals, is to be determined, not by the wisdom of the act, or by the motives of the actor, but by the single consideration whether it is within its right. If so, it is valid, however mistaken or wicked it may be.

The distinction between the question of *function* and the question of *right* is also illustrated by the discussion that has arisen with reference to the provision of the late Democratic platform, declaring the protective policy of the government to be unconstitutional. Conflicting opinions on this point, from a Democratic point of view, may be reconciled by saying that this policy is within the right, but outside of the function of the federal government; and, therefore, that it is unconstitutional, as not being the exercise of a constitutional function; but constitutional, as being the exercise of a constitutional right.

§ 20. *Of the Essential Functions of Government.*

The functions of government are necessarily determined by its nature and end, and this, again, by the principles or qualities of human nature, which give rise to the necessity of government, and which thus constitute its *raison d'être*, or the cause of its genesis and continued existence. This subject was considered in the last chapter, and it was there shown at length that this cause, or reason for the existence of government, is the tendency of men to commit injustice, and the consequent necessity of government, or organized political force, in order to secure to individuals immunity from injustice; and hence, in the language of Cousin: "Government, in principle at least, is precisely what Pascal desired—justice armed with force." Hence, the principal end of government—to use the language of the Constitution of the United States—is, "to establish justice," or, in other words, to protect the rights of indi-

*R. I. *vs.* Mass., 12 Pet., 657–717.

†Bennett's Case, 44 Cal., 88.

viduals from aggression, either foreign or domestic. And this is its sole essential end; for all other ends of society can be more or less perfectly attained without political interference. (*a*) But obviously this function includes numerous others; as, for instance, the function of organizing and administering a government, and of maintaining it against attacks, from without or within, and, as consequent upon this, the functions of taxation, judicature, legislation, punishment and many others. All of these are essentially necessary, either directly or indirectly, to the exercise of the function of maintaining justice and therefore to be admitted.

§ 21. *Of Other Functions of the State and of the Several Theories with Reference Thereto.*

Whether, in addition to the maintenance of justice and the several functions therein involved—which may be called its essential functions—government has other functions, is an important question, and one upon which there is much difference of opinion. On the one hand, it is asserted that the functions of the State are strictly limited to the realization of right or justice; on the other, that they extend to the promotion of the happiness or welfare of the community in every way. The former of these theories is variously designated as the doctrine of *laissez faire*, *laissez passer*, or *laissez aller*, and has latterly, I believe, by Mr. Huxley, been nick-named *administrative Nihilism;* the latter may be called the *utilitarian doctrine*. Between these two theories, as extremes, there are several others, which, while according to the State more extensive functions than the former, yet assign a well-defined limit to State interference. Of these, two may be distinguished: The one regards the maintenance of justice as the essential end of government, and the performance of this function as a limitation on its other functions, without assigning any other limit: The other regards it as the proper function of government also to supervise, protect, encourage and direct, the natural development of man and society. The former is the practical view commonly taken by the jurists, and may, therefore, without impropriety, be called the *juristic* theory of political functions; the latter, from the fact that it regards the State—in the sense explained in the last chapter—as organic in its nature, has been called, though not with strict propriety, the *organic* theory of the State. These several theories will be discussed in the order in which they have been named.

§ 22. *Of the Laissez Faire Doctrine.*

Of the first theory—the *laissez faire*, or *let alone* doctrine—the most conspicuous representative is Mr. Herbert Spencer, whose works have made the subject so familiar in this country and England as to dispense with the necessity of treating it here at length. (*b*) His position is thus admirably stated in one of his latest works:

"Whether, *in the absence of war*, a government has, or has not any-

thing more to do than this (*i e*, to maintain justice), it is clear that it has to do this. And by implication, it is clear that it is not permissible to do anything which hinders the doing of this." This, it will be observed, is, so far, a precise statement of what we have called the *juristic* doctrine.

"Hence, the question of limits becomes the question whether, beyond maintaining justice, the State can do anything else without transgressing justice. On consideration, we shall find that it cannot."*

Three arguments are urged in support of this position, which are drawn (1) from the nature of the State,† (2) from the imperfection of political instrumentalities,‡ and (3) from the demoralizing influence of governmental interference on private character.§

With the last two arguments, so far as they go, I entirely concur. Thus, with regard to the last, it cannot be doubted that the progress of individuals and of society is, in the main, the product of individual energy and voluntary coöperation, and that these forces operate most efficiently in a state of liberty; nor can it be doubted that the virtues, intellectual and moral, by which this progress is effected, must necessarily be more or less deteriorated by the assumption of unnecessary functions by the government, and the consequent disuse of such functions, by individuals and voluntary associations. And this is especially manifest with regard to the capacity for private coöperation; which, in the view of the most sober and profound thinkers, must constitute the principal instrumentality in the development of civilization; and which, it is not extravagant to hope, may, in the end, take the place of government in the performance of all but its absolutely essential functions.

With regard to the second argument—namely, the argument from the imperfection of political instrumentality—the reasoning is even more conclusive; for, whatever view we may take of the extent of the functions of government, it is obvious that we must always consider, not only the legitimacy of the end, but also the efficiency of the means by which it is to be attained; and, hence, that no functions should be undertaken, except those absolutely essential, until an efficient instrumentality for its performance can be obtained. Nor is there any proposition more entirely demonstrated by historical experience than that the political agencies with which we have hitherto had to deal are utterly and entirely incompetent for the purpose, on account of the dishonesty, and, still more, the ignorance, of government officials. It is also, as we have observed, a fact of fundamental importance that the only efficient means we have of directing and controlling the government is public opinion, and especially that form of it which constitutes the positive morality of the community. Hence, it is evident, the only hope of an improvement in political organization, and in the character of political rulers, lies in an enlightened public opinion. But this, at the present time, and not less in this country than in others, is, with regard to political matters, lacking, in the highest degree, both in honesty and in knowledge. We need, therefore,

* *Justice.* † *Id.*, Sec. 121. ‡ *Id.*, Sec. 123, *et seq.* § *Id*, Sec. 135, *et seq.*

as an essential condition to the enlargement of the functions of government, a cultivation of political science in all its departments; and until this takes place, and public opinion is thereby enlightened and by this, or other means, an improved political organization, and a moderate degree of honesty and intelligence in our public officials obtained, all thought of governmental interference, beyond cases of the strictest necessity, should be abandoned.

Hitherto, nearly all the interferences of government with individual action, beyond what were essentially necessary, have been, if not in their end, at least in their execution, altogether unjustifiable, and such interferences have been, and are the source of more human misery and unhappiness than almost any other cause. So that, in fact, instead of regarding the present condition of things as being the result of a *laissez faire* policy—as is commonly asserted by those who favor an extension of the functions of the State—the opposite is true, and it must be regarded largely as the result of such undue interferences by the government. The advocates of the *laissez faire* doctrine may, therefore, justly claim that before any argument against it can be drawn from experience, we must first give the policy a fair trial by divesting the government of unnecessary functions; and, under this view of the matter, those who are opposed to governmental action beyond the demands of necessity may, without shame, accept the name applied to them by Huxley, and, with Prof. Sumner, regard themselves, to this extent, as Nihilists. (*c*)

But just here, a great and almost insurmountable difficulty presents itself; the existence of which constitutes one of the most serious arguments against undue governmental interference. For it is a fact, as undoubted as it is unfortunate, that whenever a policy is once adopted, however unjust and detrimental to the public interests it may be, it generates immediately a host of private interests, by which it is so buttressed and defended as, in general, to make it almost impregnable. Of this, a thousand illustrations might be given, but, as in every case there has been developed a strong and interested public opinion, the illustrations would simply have the effect of prejudicing the minds of many readers against the principle itself, and will, therefore, be dispensed with. The reader may, however, readily find sufficient illustration in the opinions of his political opponents.

The doctrine of *laissez faire* must, therefore, I think, with reference to the existing state of things, be regarded as practically established; and to those who would deny it, we may say, with Oxenstiern: "*Nescis, mi fili, quam parva sapientia regitur mundus.*" (*d*)

But while this doctrine, as a practical maxim, is, for the present, to be accepted, this cannot be said of it as a universal theory, true of the future, as of the past. Nor is the argument of Mr. Spencer on this point at all conclusive. His conclusion, as we have seen, is that the State cannot do anything beyond maintaining justice, "without transgressing justice;" and the argument is, that, in going beyond its function of maintaining

justice, the State must do this, "in one, or both, of two ways, which, severally or jointly, reverse its duty."

Of these, the first consists of cases in which the State restrains "the freedom of some individuals more than is required by maintenance of the like freedom of other individuals." And these cases "are themselves breaches of the law of equal freedom." This, indeed, is obviously a legitimate application of "the law of equal freedom," but that law itself —as will be shown more fully hereafter—cannot be maintained; for there are obviously cases, as, for instance, those of minors, and persons *non compotes*, in which interference by the State, though in violation of the law of equal freedom, is not only proper, but obviously essential.

The other argument is, that taxation is itself a diminution of freedom, and, except where required for the necessities of the government, therefore unjust; and to this proposition we think there can be no reply. But the question of the extent of the legitimate necessities of the government is the very question at issue, and it cannot be assumed that they are limited merely to the essential function of maintaining justice; but, as I will attempt to show, they are more extensive. Nor does the argument apply to those resources of the government which are not acquired by taxation —as, for instance, the public lands of the State, and property acquired by escheat, and also property acquired by gift: with reference to which, or at least to the last, no question can be made. This mode of acquisition by the State—*i. e.*, by gift—will, indeed, probably be regarded as insignificant; but such is by no means the case. All the immense property devised or given to public charity is, in fact, given to the State, and is ultimately subject to its disposition; and it is extremely probable that, by an encouragement of the natural disposition of men, under certain circumstances, to leave their property for public uses, or charity, this source of acquisition might be rendered enormously prolific. For, at all times, there is a certain percentage of men, who, either from feelings of duty, desire to devote their wealth, or some part of it, to the good of their fellow-men, or who have no other objects to which they desire to devote it; and I do not think it can be doubted that, if there were an efficient department of the government to take charge of such bequests, and gifts, and to devote them to the public good, either generally, or in reasonable accordance with the will of the donor, such bequests would enormously increase.

This is, in fact, shown by the great acquisitions of the Church, prior to the statutes of mortmain, and also, by the large sums that have otherwise been devoted to charities of various kinds. Hence, I regard it as probable, that a never-dying corporation like the State could, in this way, if desirable, acquire property to an almost unlimited extent, and that the disposition of men would, in this respect, have to be curbed rather than encouraged. The real difficulty is that, under existing circumstances, it could not be hoped that such resources would be wisely and efficiently administered.

§ 23. *Of the Utilitarian Doctrine.*

The Utilitarian doctrine is formulated in the proposition that the functions of government extend to the promotion of the happiness or welfare of the community generally. The proposition is a very specious one, and calculated to mislead. In effect, it consists of two propositions: (1) the Utilitarian principle generally, as the fundamental principle of Morality; and (2) the inference from it that the welfare of the community may be subserved by governmental interference, whenever deemed expedient.

The general principle will be considered hereafter, and it will be shown that it is not only false, but also so indefinite as to be of no practical use as a standard of conduct. But for the present—for the sake of the argument—we may accept it as true, and consider only the inference from it.

It is to be admitted that the ultimate end of the State is to promote the welfare of the community; by which is to be understood, the welfare of the individuals of the community, and of all of them. But—as we have seen—this end is accomplished, not merely by the instrumentality of government, but also and chiefly by the free action of men, controlled and modified by the natural influences of society upon them; and hence, the action of government is but one of the means by which the ultimate end of the State is to be accomplished. And it is equally clear, with regard to the governmental functions of the State, that the fundamental rule, by which their exercise should be determined, is that justice is to be observed; for this, of all conditions, is most imperatively demanded by a just regard to the welfare of the State, and of all its members. Hence, the real questions involved are, not as to the ultimate end of the State, or of the government—as the theory would seem to imply—but (1) whether there should be governmental interference with natural processes operating efficiently, or, in other words, with the automatic functions of the State, and (2) whether the welfare of the community can ever be subserved by violating justice.

To both of these questions, the answer is clear:

The most obvious dictates of the principle of Utility, as of all other theories of justice, demand: (1) that there should be no unnecessary governmental interference with the liberty or free action of men, either individually or in the aggregate; and, consequently, the development and conduct of the State, as well as of the individual, should be left, as far as practicable, to the operation of natural causes; and (2) that the observance of justice is the fundamental condition of social well-being, and its violation always pernicious.

Accepting these qualifications, the theory becomes identical with the *juristic theory*, next to be considered. But, in fact, these qualifications are ignored by the Utilitarians; the vice of whose system is in ignoring, and, in effect, even in denying the existence of justice.

§ 24. *Of the Juristic Doctrine.*

We come next to what we have called the *juristic theory* of the functions of the government; which is, that the maintenance of right or jus-

tice is an essential function of government, and its performance, a limitation on its other functions; in other words, that it is not permissible for the government to do anything that is inconsistent with justice.

More specially, the principle, and the grounds upon which it rests, may be stated in the following three propositions:

(1) There is always a presumption in favor of liberty, which rests upon the principle that the healthy development, and consequent welfare of man, considered either individually or collectively as a State, can, in general, be secured only by leaving his development to natural processes, and hence that in every particular case, the presumption is against governmental interference, and the burden of proof upon him who asserts its propriety.

(2) In order to secure the liberty or freedom of action essential to the healthy development and well-being of man, the State must interfere by governmental action, so far as may be necessary for the purpose; and hence, it is the essential function of government to maintain justice.

(3) It follows, as a corollary of the last proposition, that the performance of the function of maintaining justice (which constitutes the *raison d'être* of government, and the condition of its existence), is a limitation on its other functions; and that no other function can be admitted that is inconsistent with this.

§ 25. *Of the Organic Theory of the Functions of Government.*

These propositions, however, do not establish the negative proposition of Spencer and others, that the functions of the State do not extend beyond the function of maintaining justice; and it remains, therefore, to consider the affirmative of this proposition.

On this point, as we have said, it cannot be denied that the ultimate end of the State is the welfare or well-being of the individuals—including future generations—that compose it. But this end can be effected only by means of society—which is as essential to the welfare of each individual as food or raiment or shelter—and, in general, only by the perfect freedom of its action. The government may, indeed, with the resources of the State, assist this or that individual or class of individuals, and thus add to the fortunes and perhaps to the happiness of such individual or class; but, as all its rights are held in trust for, and in fact belong to the whole community, it cannot legitimately or justly do this, except to the extent that the interests or the obligations of the whole community may require it. Hence, it may be said that the ultimate end of government is merely to maintain the healthy existence and development of society.

To this end, as we have seen, it is an essential condition that justice should be observed; but justice itself is perhaps but a corollary from a higher principle; namely, that the *summum bonum*, or greatest good of man, is the perfect and harmonious development and exercise of his faculties; and that his nature is such that the principal instrumentality of such development must consist in individual liberty, operating freely under

the natural and fructifying influences of society. From which it must be inferred that justice—which is but the maintenance of the rights or just liberty of the individual—demands that the largest liberty should be accorded to him that is compatible with the highest development of all, and no more. (*e*)

Hence, we may say, that justice, though the immediate and direct end of the State, is but subsidiary and subordinate to its ultimate end ; which is the maintenance and healthy development of society, in its highest form. (*f*)

The genesis of society, as of the individual, is natural and spontaneous. Men naturally and inevitably place themselves, or are placed, in social groups, such as the family, the village, town, or city, or neighborhood ; and in many other kinds of associations, whether incorporated or otherwise, such as churches, schools, colleges, and associations for friendship, charity, business and other purposes, and finally in the State and in the world community of civilized nations ; to which is to be added that great society of the living and the dead, of which literature makes us members. By the influence of these associations, the manners, beliefs, tastes, aspirations, ideals, and ambitions, and consequently the character, career and fortunes of the individual are to a large extent determined. So that it may be said, without much exaggeration, that the modern man is almost wholly the product of the social influences to which he has been subjected, and that it is these alone that have differentiated him from the primitive savage.

The development of the society which we call the State, like that of the individual, is also in the main spontaneous, being determined by the resultant of the characters of its individual members, and subordinate social groups, by the influence of other States, and by its own history. If we regard it (as, for the sake of illustration we may—though such analogies are dangerous), as a body politic, or fictitious or imaginary person, it may be said that its growth, like that of the individual man, is natural and organic, and that undue interference with its natural development must result in death or disease ; and hence, in general, the function of government is merely to protect it from interference by force or fraud.

But the State, like the individual, is subject to evil influences, intellectual, moral, and physical, by which its opinions are vitiated, its morality corrupted, and its health deteriorated ; among which often the most serious is the evil influence of its own government. The result is, that it often loses the capacity for healthful development, either wholly—as in the later Roman Empire, and in Turkey, China, India and Asiatic countries generally—or partially—as is generally more or less the case with ourselves and other European peoples. Here, then, it seems to be an obvious function of government, not only to remove the evil influences which have caused the disease, but also, if possible, to cure the disease itself, by directing and encouraging the social progress ; nor does it seem less apparent that it is also its function to check in the beginning any tendency to

evil, before the consequences have become disastrous. Hence, we may conclude that it is the function of government to supervise the development of society, check its evil tendencies, and when necessary—though the performance of the function is a delicate one—to direct and encourage its healthy progress. For the exercise of this function is not merely for the benefit of this or that individual or class, but is essential to the welfare of every individual of the community. But it is to be understood that this function does not extend to the interference with the development of society, or of the individual, unless demanded by necessity; that is to say, the government should interfere only so far as absolutely essential to its healthful existence and development. (*g*)

§ 26. *Illustrations of This Principle.*

The application of the above principles may be illustrated by reference to the numerous familiar cases of State interference, which have of late years been so warmly discussed; such as public education, the encouragement of literature and the arts, the supervision of the public morality, the regulation of railroad corporations and of monopolies generally, and public improvements, etc., to some of which we will briefly refer. All of these, it will be seen, may in theory be justified by the principles we have laid down; but it will also be seen that these principles are in general violated in the practical exercise of the governmental function.

With regard to education, it cannot be doubted that, to a certain extent, and for specific purposes, it comes within the function of the government. This is clear enough with reference to the education of military and naval officers, and also that of soldiers and sailors generally. Hence, the fishery bounties allowed by the United States Government were, at one time, a legitimate exercise of governmental power, as tending to produce a supply of seamen for the navy in time of war. And on the same ground, the money expended by the United States Government for the encouragement and education of militia organizations is an equally legitimate expenditure. And the same principle might perhaps with advantage be applied, as in France, to the education of young men with a view of providing material for the civil service. Indeed, with regard to one branch of the civil service, the exercise of this function by the government of the United States is imperatively demanded by the necessities of our situation—namely, the diplomatic service—the efficiency of which is such as frequently to put us in a humiliating condition in our intercourse with foreign nations, and is likely, at any time, to involve us in great difficulties and dangers.

Another case where government interference is demanded is for the education of lawyers. So far as the lawyers themselves are concerned, they seem to get along very well with the imperfect education of the present day; and it may be said that often a thorough and scientific knowledge of the law may operate to their disadvantage by putting them out of touch

with their professional brethren and the judges; but, unquestionably, the interests, not only of litigants, but of society generally, are injuriously affected by the lack of such education. So that, with regard to the former, it may not be extravagant to say that the license of the average lawyer is to be likened, as it were, to a letter of mark, authorizing him to prey upon mankind. And with regard to society, it cannot be doubted that the efficient administration of justice, for which thoroughly educated jurists are required, is essential to the preservation of the positive morality of the people, which is in fact the life of civilization; and that the inefficient performance of the judicial functions is of all other causes of demoralization the strongest and most irresistible.

On the same grounds, also, it is evident that it is a legitimate function of the government to encourage education in political science; for this branch of literature is so unremunerative, that, without such encouragement, it must continue to be, as it has been, neglected. So, too, with regard to citizens generally, it is necessary and therefore legitimate for the government, by the judicious supervision of education, and, when necessary, by affirmative help, to provide for their education in such points as may be necessary to fit them for their political functions; and this includes, undoubtedly, as an essential condition, instruction at least in the primary branches of education. But beyond this, and perhaps some similar cases that I have overlooked, no satisfactory grounds can be assigned for the further extension of the functions of the government in this direction; and it is therefore difficult to conceive of any principle upon which to justify the American theory of public education, which aims to absorb the whole of education, and whose object is conceived to be the good of the individual student.

The same considerations apply to the encouragement of literature; which it is the legitimate function of the State to encourage so far as necessity may demand; as is the case with reference to political and moral science, and also philosophy generally. For in this branch of literature, even if we may count upon a few high spirits, who, at the sacrifice of their worldly interests, may devote themselves to it, we cannot count upon their finding readers, or sufficient remuneration for their services to keep them alive. But this object is not at all effected by the copyright laws, whose effect is rather to submerge the productions of solid thought under a flood of shallow and unprofitable matter, which, in the mass, cannot be said to conduce in any way to the welfare of society. In this, I am no doubt singular; for even Mr. Spencer, and other administrative nihilists, justify this policy, not, indeed, on the ground of its being conducive to the interests of society, but on the principle of the author's supposed right of property in his work—a principle which, it seems to me, is altogether without justification. For the supposed right, as has been uniformly held by our courts, has no analogy whatever to the right of property, and cannot be regarded in any other light than that of a mere monopoly.

So, with regard to public libraries, it cannot be doubted that they can be made one of the most efficient means of educating the people ; but as conducted, they serve only for their amusement, and are therefore illegitimate. The remedy, however, is very simple ; it is rigidly to exclude all books except such as may serve for instruction ; or, to adopt a rough criterion, to exclude, with some extremely limited exceptions, all novels and light literature. This would reduce the cost of administration perhaps tenfold, and would make it practicable to secure a fair collection of solid works. In these observations, I, of course, do not refer to the great public libraries of the world ; whose main object is to preserve literature.

The same observation is true, also, with regard to patent rights, the effect of which, instead of being conducive to the welfare of society, has been to divert the genius of men to matters merely material, to the exclusion of the higher thought which the moral and intellectual progress of mankind demands. Hence, though I do not doubt it is the function of the State in certain cases to encourage inventions, I am far from the opinion that the exercise of this function in the manner in which it has been exercised has been judicious.

The functions of the government also undoubtedly extend to the protection, and, in proper cases, to the encouragement of the positive or received morality of the people ; in which, it cannot be too often said, the life of the community consists, and which is but another name for its civilization. For no fact appears more manifestly on the pages of history than that civilization progesses only when the political morality of the people, to which private morality is essential, is in a healthy state, and that with the degeneracy of its morality the national life becomes extinct. This is illustrated by the communities of Greece, and by the Roman republic, and by all countries of which we have had any account ; and it may be taken, empirically, as a law of human development.

The mode in which this function shall be performed is another question. Generally, the true policy is non-interference ; but where a tendency to demoralization manifests itself, it is the function of government to remove it ; nor do I doubt that in proper cases it is equally its function to encourage virtuous action, and especially virtuous political action, in its citizens. But as to the practical exercise of the function, it must be confessed that the most formidable source of demoralization has been the example set by the dishonesty of public officials, and by the government itself when acting under the pressure of depraved popular opinion (*"Civium ardor prava jubentium"*).

With regard to railroad corporations, and other transportation companies, in view of their enormous and resistless influence over the rights and interests of citizens, it cannot be doubted that it is a function of the government to regulate their charges and mode of operation ; and such, accordingly, is the doctrine of our courts. And if no means of regulating them can be devised, and no other mode can be suggested, it is even true that the rights of the community would require the government

itself to own, and to operate them : and the same principle would apply to all monopolies. It must also be regarded as a function of the government to encourage the construction of highways and streets so far as essential to the comfortable life and healthful development of society ; as, for instance, in the case of cities, which it is obvious could not exist without the exercise of this function. But it must also be confessed that the exercise of this function has not hitherto been unexceptionable.

Nor can it be doubted, to add one more illustration, that the functions of the government extend, under proper conditions, to the coinage of money and to fixing the value of the coins and making the same legal tender, and also to the issue of paper money, and the general supervision of the currency. Indeed, the necessity for the exercise of these functions is so apparent that it is never denied, except by those who have profited by some previous action of the government in that regard (generally illegitimate), and who, therefore, naturally desire to be left alone. But there is perhaps no function of the government of which history presents more numerous instances of its illegitimate exercise than this. It will be sufficient, however, to illustrate the subject by a brief reference to our monetary history during and since the civil war.

The issue of greenbacks during the war and making the same legal tender for past debts, was, in fact, a violation of the terms of such contracts. For, in all cases of contracts to pay money where no particular kind of money is specified, it is always a condition, expressed or implied, that the payment shall be made in the money current at the time of the contract. Hence, this legislation was in effect *pro tanto* a confiscation of the property of the creditor.

On the same principle, in all contracts to pay money made subsequent to the passage of the act, where no particular kind of money was specified, the debt was payable in greenbacks, or any other legal currency at the option of the debtor. But it is obvious that wherever the value of money changes, either the creditor or the debtor is injured, or, if the change be by the voluntary act of the government, defrauded ; and hence that to *appreciate*, is as unjust and immoral as to *depreciate* the currency ; and nothing, therefore, can be more obvious than that it is the duty of the government, so far as in its power lays, to prevent all fluctuations in the value of money. Thus at the end of the war when legal tenders were at a low ebb, their value was, of course, increased by the large demand made by the entrance of the South again into the financial system of the country—greatly to the damage of the debtor class whose debts were thus in fact increased ; but the damage was the result of circumstances which the government could not control, and hence was *damnum absque injuria*. But the subsequent legislation of the government, avowedly designed gradually to appreciate the value of its paper money and finally to redeem it in coin, was in violation of all principles of justice, and in effect constituted the levy of a subsidy of about fifty per cent. on the average of the total private indebtedness of the country during the period of the appreciation of the greenbacks—amounting to billions of dollars.

This legislation was justified upon the ground that the government had contracted to pay the face value of its notes, and that justice required that this obligation should be fulfilled. But, even if the performance of this obligation could not have been deferred, it may be said, paradoxical as the proposition may appear, that it was unjust for the government to perform it, at least in the manner that it was performed. For the greenback was not merely a contract of the government; it was also the money of the country, and could not be appreciated in value in any way without levying an unjust subsidy upon all the private indebtedness of the country; so that, in fact, the government could not pay its notes in specie, without also compelling the unjust payment of ten or twenty times the amount by private parties. And it may be safely said that, where the government can only pay its debts by taxing, to a tenfold, or twentyfold amount, other parties, equity forbids it to pay. But, in this case, the action of the government was entirely gratuitous; for it could, without violating the contract, have delayed the payment, or, even if it had repudiated its contract by paying only the actual value of the currency, it could afterwards have compensated the parties injured. The effect of this policy, so highly lauded, and pointed to with pride by many, was to transfer, unjustly, from the debtor to the creditor class many billions of dollars.

Another effect, less important, but still monstrous in proportion, was to double the bonded indebtedness of the United States. And this was aggravated first, by the legislation making the bonds payable in coin, and then by the demonetization of silver—thus largely appreciating the value of gold, and making them payable in that metal.

These conclusions, indeed, are warmly disputed, and those who affirm them are characterized as cranks, or as debtors aiming to defraud their creditors; but in the main, the principles upon which they rest are not contested by competent writers upon financial subjects, whether bi metalist or mono-metalist; and they are too obvious to be intelligently disputed.

I touch here, contrary to my custom, upon matters of current politics, and it is not be expected that what is said will be dispassionately considered; but a few words on the other side of the question may perhaps tend to set me right with some of my readers. It is proposed now to reform the currency by remonetizing silver at a ratio of 16 to 1. That the demonetization of silver was one of the most disastrous mistakes that has ever been made, I do not doubt; nor do I pretend to deny that I am in favor of its remonetization; but I readily perceive that to do this without injustice is a difficult task. The principle underlying the whole subject is the one already referred to—that a change in the value of the currency is an injury, and generally a robbery, either to the creditor or the debtor. The issue of legal tender greenbacks, and their final redemption, by means of the demonetization of silver, in gold coin, was a palpable robbery equally of the debtor and of the government. But, as we have for years

been in effect upon a gold basis, and as payment in gold is therefore, either expressly or impliedly one of the terms of every contract for the payment of money, the remonetization of silver, it may well be claimed, would be a robbery of the creditor, and, therefore, unless accompanied with other provisions of the law obviating injustice, an illegitimate exercise of governmental functions. Hence, to prevent injustice from the resumption of the free coinage of silver at the old ratio, it would be necessary for the government to redeem all outstanding currency, gold, silver and paper, at its value in gold, and for the law to provide for the payment of all existing debts public and private in gold coin. To the justice of this course neither party could make just objection; not, the gold men; for contracts would be paid according their tenor; nor the silver men; for it is claimed by them, and I think justly, that gold would be depreciated. This would be a great, but not impracticable undertaking; and perhaps in view of the disastrous effects of the demonetization of silver, and of the absolute necessity of a remedy, it might be also advisable. (*h*)

NOTES.

(*a*) "Man, born in a family, is compelled to maintain society, from necessity, from mutual inclination and from habit. The same creature, in his further progress, is engaged to establish political society, in order to administer justice, without which there can be no peace among them, nor safety, nor mutual intercourse. We are therefore to look upon all the vast apparatus of our government as having ultimately no other object or purpose but the distribution of justice, or, in other words, the support of the twelve judges. Kings and parliaments, fleets and armies, officers of the court and revenue, ambassadors, ministers and privy counselors, are all subordinate in their end to this part of administration" (Hume's *Essays*).

(*b*) The origin of this, the *laissez aller* theory, is ascribed by Mr. Ahrens to Kant, to whom he thinks the reaction from the theory of Wolf is due. "Thenceforth," he says, "the State was conceived as an institution, not for eternal or temporal salvation, but for right, guaranteeing to all liberty, and nothing but liberty, which each was to use consistently with the liberty of all, and according to the moral views freely formed in his own conscience. The theory of Kant upon the end of the State thus conducted to the first conception of the State as an institution, or *State of right* (*état de droit, rechts-staat*), which England has, in great part, realized in practice, which Adam Smith, with whom Kant has been paralleled, has established from the point of view of the liberty of labor, and which the United States have realized still more completely in all their Constitution. Nevertheless, the theory of Kant went beyond all reality. For even the United States, where the particular States take so great a care of public instruction, have not gone so far in the limitation of the action of the State. The theory of Kant did not respond sufficiently to practical exigencies, and it was also recognized, from the philosophic point of view, as an exclusive, abstract theory, leaving out of view all the ends of man with which right ought to be put in relation. To remedy this great defect attempts were made to combine the two opposed theories of right, and of happiness, or, rather of the common good, by presenting right as the primary, or direct, immediate end, and the common good, on the contrary, as the secondary or indirect end, yet without determining precisely the relation of the one as the mean, with the other as the final end" (*Cours de Droit Naturel*, Sec. 106).

(*c*) I quote Prof. Sumner from memory. The fact is there has never, in any modern government, been even an approximation to the *laissez faire* doctrine, and no argument

against it can, therefore, be drawn from experience. The suffering and oppression among operatives is generally cited as an illustration of the unsatisfactory workings of the doctrine. But in reality they are the victims of power in a large measure created by artificial political arrangements. To bring the State under the full operation of the doctrine, it would be necessary to repudiate, or at least to essentially modify, the existing policy of the State with reference to the following subjects, viz., contracts, and especially contracts for the payment of interest, patent and copyright laws, corporations, taxation and other subjects.

Thus, with regard to usury, or interest, there is an almost universal consensus of opinion in favor of allowing it, and I do not mean to say either that I am, or that I am not, of a different opinion; but certainly the arguments which have been advanced in its support, and which have served to convince the world, are very far from being satisfactory.

The celebrated argument of Bentham, which is regarded as having settled the question, is even childish in its simplicity. Briefly, it is "that no man of ripe years and of sound mind, acting freely and with his eyes open, ought to be hindered, with a view to his advantage, from making such bargains in the way of obtaining money as he thinks fit."

And he adds:

"Were it any individual antagonist I had to deal with, my part would be a smooth and easy one: 'You who fetter contracts, you who lay restraints on the liberty of man, it is for you, I should say, to assign a reason for your doing so.' That contracts in general ought to be observed is a rule no man was ever yet found wrong headed enough to deny," etc. (*Defense of Usury*, Introduction).

But obviously Bentham here mistakes the issue, and it is he who is arguing in restraint of liberty; for his thesis is, not that men ought to be permitted to agree to pay interests, but that the State ought to compel him to do so; and he in fact assumes as his first principle that all contracts should be enforced. But, as observed elsewhere, there is no such principle—taking the proposition universally—known to the law, or to right (*v. infra*, pp. 140, 141), and the question presented in this and all other cases of contract is whether the force of the State ought to be used.

With regard to taxation, omitting the other subjects referred to, the power of taxing, both as to amount and as to kind of taxation, is unlimited, and the power is used, not simply for the purpose of providing for the necessary expenses of the government—its only legitimate object—but for the purpose of so-called protection, and other equally illegitimate purposes; and it is impossible to calculate what effect this has had upon the inequalities of condition in the body politic.

(*d*) We quote this from Mr. Coleridge, who uses it to emphasize his own experience of "the extreme shallowness and ignorance with which men, of some note, too, were able, after a certain fashion, to carry on the government of independent departments of the empire" (*Table Talk*, London, George Routledge & Sons, p. 194).

(*e*) This is well expressed by Amos: "The generic expression which denotes, for any given age or country, the exact measure of personal liberty for every man, which supplies the most favorable conditions for the highest possible development of all, is rights" (*The Science of Law*, p. 91). And this seems to agree with the view of Krause, or rather of his Spanish translator, Sauz del Rio: "Right requires that all men shall give and receive mutually and in social form, every condition necessary for the fulfillment of their destiny, individual and social." "The idea of right . . . . looks to the totality of human ends, and the conditionality thus imposed on man as itself an end" (*Ideal de la Humanidad*, p. 48).

(*f*) Mr. Ahrens, in reviewing the principal theories as to the end of the State, distributes them into three grand categories, the names of which—for lack of ability to translate them satisfactorily to myself—I give in the original, namely, "la théorie d'unité, les theories partielles, et la doctrine harmonique."

The first theory is that which confounds the end of the State (by which it will be understood Mr. Ahrens means the organized State, or government, or the political order)

with the end of the social order in general, or, as I would say, which confounds the end of the government with that of the State.

The second category comprehends the several theories, which assign to the State one, or several, particular ends. This class includes numerous and inconsistent theories, as, for instance, that of Aristotle, who, with Cicero and Grotius, distinguished "a direct end of the State, consisting in the maintenance of justice, and an indirect end, consisting in happiness or well-being;" it includes also the theory of Thomasius and Kant, who make a radical distinction between Right and Morality, and assign the first as the sole end of the State—holding that the State should not otherwise concern itself with the happiness of its members, but should leave it to the free choice of each to seek his own happiness; and also, the doctrine of Leibnitz, who regards the end of the State to be the *perfectionment* of society, and that of Wolf, who regards it as happiness or felicity, or the common welfare and safety; and finally also that of Hegel, which may be regarded "as the culminating point of the modern movement which commences by presenting the State as the pivot of social order, and ends, not only by absorbing, in the ancient way, everything in it, but also, by conceiving the State itself as the absolute end, as the manifestation of the Divinity, or, as the 'present God'" (or, as Hobbes says, "the Mortal God"), an apotheosis by which the just relations of the State, as a means, with the culture of all that is divine and human, are completely inverted.

"The third category consists of the doctrines which seek the *organic* and harmonic relations of the State (*i. e.*, the government), and its end, with the order, and the end of human society. Apart from certain feeble essays attempted by others, there is only the doctrine of Krause by which these organic relations can receive a precise definition in conformity with all the tendencies, at once, of liberty and of humanity, in our epoch" (*Cours de Droit Naturel*, § 106, Du But, *De l'Etat*).

This doctrine forms the basis of Mr. Ahren's own exposition; which is set forth in the following section (Du But, *De l'Etat ou Point de Vue Ideal*), and more generally in the first part of the work in § 5, and which will be again reverted to.

(*g*) The views in the text seem to agree, at least in the conclusion reached, with those of Mr. Ahrens:

"When we speak of right," he says, "as the fundamental end of the State, and thus concede the State as being by its essence *l'etat de droit* (*rechts-staat*), we must remember that right has not its ultimate end in itself, but in human culture: it follows, then, that we must assign to the State a double end; an immediate, direct end, that of right, and an end indirect, but final, consisting in the social culture. This distinction is explained by several authors, but none of them, with the exception of Krause, has made clear the intimate and necessary relation existing between right as the direct end, and all culture as the final end."

But the author explains, at length, that this function consists "in regulating or ordering the relations of life and of culture, without intervening in the causes and productive forces which are situated outside of its domain and its action;" and "in realizing, for all the spheres of life, the conditions of their existence and their development." "Intellectual, moral, religious, economical causes," he says, "are the primary powers, the immediate sources of life, and the powers of the State can consist only in keeping open the sources of life, from which flow, by the free and proper impulsion of all the forces, individual and social, the good influences which form the ever increasing aliment of social life" (*Cours de Droit Naturel*, pp. 331, *et seq.*).

I am unacquainted with Krause's views, with which Mr. Ahrens expresses his agreement, except at second hand. As well as I can make out, his theory seems to be, that the end of government is simply the maintenance of right or justice, but the sentiment of right is regarded by him, "not as a sentiment of individuality," but as "the sentiment of a common and reciprocal relation" which demands "that all men should give and receive mutually every condition for the fulfillment of their destiny, individual and aggregate" (*Ideal de la Humanidad*, Sec. 17). The difference between this, and the narrower view of justice, may be illustrated by the two forms of the familiar maxim, viz.: "Do unto others what you would have others do to you;" and: "Do not to others what you would not have others do to you."

Hence, "the State, as the exterior form of justice, ought to assure to its citizens all the conditions necessary for accomplishing freely the totality of their destiny; but the interior conditions of liberty and moral merit, the internal operations of the mind, and the superior powers of the understanding and the will are outside of its sphere, and above its means. In these particulars, the State can only give the exterior conditions . . . . thus giving legitimacy (*derecho*) to the activity of other institutions relating to the destiny of humanity; but the State can neither found nor direct the interior life of these institutions" (*Id.*, Sec. 25).

We add, for the purpose of more fully explaining and illustrating the organic theory of the State, the following observations of Mr. Ahrens, whose views we have already so largely noted:

"No organism can exist and be developed without a certain equilibrium between all its parts. In the physical organism it is maintained by natural laws. In the ethical and free organism of the State it ought to be preserved by rational laws formulated and executed according to the free fluctuations of the social life of the State. To maintain to a certain degree, the equilibrium, the proportion, the harmony between the different branches of the social work of culture, above all to arrest evident deviations and protuberances, this is the important function that the State ought to fulfill, both by general laws regulating better the relations between the different parts, and by affirmative aids, which it can distribute, according to the rules of a just proportion.

"It is this action of organic relation established first in general in the three organic functions of right which we have yet to determine more in detail. . . . .

"(1) The first principle which ought to guide the State in its activity is to recognize the probable nature, the independence, the autonomy of all the spheres of life, pursuing ends distinct from the juridical and from the political end. We have already sufficiently observed that these principles are to receive consecration by the practice of self-government applicable to all the spheres and to all the degrees of human society.

"(2) The second principal function of the State admitted by all theorists, is of the negative and restrictive nature. It consists in removing in the domain left free to the operation of *laissez faire, laissez passer*, those obstacles which are too great to be overcome by individual forces, in imposing upon the liberty of each the limits necessary for the existence of the liberty of all, and in submitting for the maintenance of eternal peace, all controversies to the tribunals. It is to this function, without doubt, very important, that a theory, the expression of an extreme tendency, has wished to reduce the end of the State. It is, as we have seen, the exclusive, abstract form of the theory which considers the State as the order of right (*l'ordre du droit*), isolating it from all the ends of culture; an opinion practiced largely in England, systematized by Kant, and carried to excess by the English positivism of Buckle. . . . .

"(3) There is then a third function assigned to the State by its end, and consisting in favoring, directly and positively, the social development. All modern theorists who have elevated themselves above the narrow point of view of the doctrine of *laissez aller* are in accord upon this fundamental principle, but none of them have undertaken to determine the mode or the manner in which the State ought to favor the social culture." "We will cite only," continues Mr. Ahrens in a note, "some eminent writers outside of Germany. Mr. J. S. Mill says that the intervention of the State ought to be admitted only in cases of imperious utility. Mr. Ch. de Remusat says: 'Whenever the question is doubtful, whenever imperious antecedents, or a necessity generally felt, does not take away the faculty of choosing between the coercive system (the action of the State), and the voluntary system (self-government), do not hesitate to reject the power and trust yourselves to liberty.' Mr. Ed. Laboulaye says: "The end of the State is the protection of the moral and the material interests of all its citizens. The maintenance of the State is then the first guaranty of liberty. To give the State the highest degree of power, it is necessary to charge it only with that which it ought to do necessarily. Otherwise it is to employ the force of all to paralyze the energy of each.' Mr. L. Bland (*l'Etat et la Commune*, 1866) says: 'Whenever the intervention of the State is in opposition to the free development of the human faculties, it is an evil; but whenever it aids in that development, or removes an opposing obstacle, it is a good.' Nevertheless these principles of necessity and of affirmative aid, demand to be more precisely formulated.

"Undoubtedly liberty, as we have not ceased to show, is the first source of light, and liberalism is right in putting itself on guard against all the measures of safety proposed by the government, in examining scrupulously whether the good which it designs by its general means does not weaken the first sources of action and personal responsibility; it is true also that an important mission of government, even at the present time, consists in repairing the evil and injustice which the governments in the past have done or allowed to be done, in removing the obstacles by which the social movement has been obstructed in all directions.

"In modern times it is in France that liberty has been most profoundly examined in its source, its practical applications and its relations with the action of the State, by the eminent writers cited above, and the existing regime (the imperial) will have had at least the effect of having effected a double moral reaction of the French genius" (*Cours de Droit Naturel*, pp. 333, *et seq.*).

(*h*) That the demonetization of silver, and the consequent appreciation of gold, or what is the same thing the resulting fall of prices, is the main factor in producing the existing financial depression, and that, from the same cause, there still remains in store for us a great aggravation of existing evils, is a proposition warmly disputed, but in favor of which the argument seems conclusive. The experience of a few years will, however, definitely determine the question; and while I believe the result will be as above stated, I will be glad to find myself mistaken.

CHAPTER III.

Of the Several Functions of Government.

§ 27. *Of the Function of Organization and That of Administration.*

The ordinary functions of government, or, as they may be called, the functions of the government, are to be distinguished from the extraordinary function, necessarily vested in every State, of organizing a government. The latter may be called the function of political organization; the former, the function of political administration—using the term in its wider sense, as including the administration of justice. This will be first considered.

§ 28. *Of the Sovereign and Subordinate Functions of the Government.*

The functions of the government are either sovereign or subordinate—the former being those exercised by sovereign officers or departments, which may be defined as officers or departments having no superior in the government; the latter, those exercised by inferior officials.

§ 29. *Of the Received Classification of the Functions of the Government.*

The *sovereign* functions of the government are commonly classified as being legislative, executive, and judicial—a division suggested by Aristotle (*a*), and afterwards more fully expounded by Montesquieu (*b*), from whom it has passed into common use. It was especially familiar to the founders of our government, and is thus the source of the provisions in the American Constitutions, State and Federal, vesting these several powers in three coördinate departments, known as the *Legislative*, the *Executive*, and the *Judicial*, respectively. (*c*)

But this division of the functions of the government—though founded upon a real and essential difference of nature, and, as practically adopted in the several American Constitutions, constituting a great step in advance in political organization—lacks scientific accuracy in several particulars; and of the terms used to denote the several kinds of functions, two, viz., "*legislative*" and "*executive*" are inappropriate and misleading.

§ 30. *Of the So-called Executive Functions.*

Thus, there are included under the term, "*executive functions*," two classes of functions essentially different in their nature, namely, first, the functions belonging to the *Chief Executive*, whether king, president, governor, protector, or of other name; and, secondly, *executive functions*, properly so called, which consist in executing the enactments of the Legislature, the judgments of the courts, and the commands of the Chief

Executive. This class of functions are subordinate in their nature, and have no place in a division of the sovereign functions, and corresponding rights or powers of the State; and hence the term *executive functions* is to be understood as denoting merely the functions of the chief executive. But, in this sense, the term is inappropriate and involves a grave error; for its use in this connection is founded upon the erroneous notion that the functions of the king, president, or other chief executive, consist merely in executing the enactments, or expressed will, of the legislative department, which is not true. (*d*) For, while it is the function of the head of the State to see that the legislative will, when not *ultra vires*, is carried out, and also the judgments of the courts, when within their jurisdiction, these are not his only functions, but he is vested with others which are independent of the other departments. On this account, it has been suggested by eminent publicists that these independent functions should be distinguished by some appropriate term; and for this purpose several terms have been suggested, as, for instance, by Blackstone, "the *Royal Prerogative*;" by German writers, "the *Inspective, or Supervisorial, Power*;" by Clement Tonnerre and B. Constant, "the *Royal Power*;" by Bluntschli, "the *Imperial Power*" (*Imperium*), and by Ahrens, "the *Governmental Power*." (*e*) Of these, the last is justified by the usage, according to which, in England, the ministry is called "the government," and in America the title of Governor applied to the chief executive of the State. It also, if we have regard to the original sense of the term, agrees precisely with the term "*royal power*," suggested by M. Constant; though for the latter the term "*regal power*," the "*potestas rectoria*" of Kant, or, still better, the "*Imperial Power*," might, perhaps, be advantageously substituted. Thus understood, all these terms well express the nature of the power in question; but as the term *royal*, or *regal*, or *imperial*, carries with it an unpleasant sound to republican ears, it will be better to adopt the term suggested by Mr. Ahrens, and to call the function in question *governmental*; the term to be regarded, not as the name of a *fourth* function, but as the true name of what is erroneously called the *executive function*, and to be substituted for that term.

§31. *Of the So-called Legislative Function, and Herein of Judicial Legislation or Legislative Jurisdiction.*

The term *legislative function* is even more unfortunate. For legislation is one of the modes in which the judicial function is exercised, and the function of legislation is to this extent judicial. For the judicial function consists in the function of determining controversies between men, or classes of men, as to their mutual rights and obligations, and obviously may be exercised in two ways,—namely, the one, by determining controversies between individuals, that are submitted to the courts, or, in other words, in the exercise of jurisdiction, in the narrow sense of that term used by the lawyers; the other, by establishing general rules for determining in advance classes of controversies that may be antici-

pated to arise. The latter is as essentially an exercise of the judicial function as the former, the only difference being that, in the one case, single controversies, in the other, classes of controversies are determined. The exercise of the latter function is, therefore, neither exclusively *legislative* nor exclusively *judicial*, and can be described in no other way than by calling it the function of *judicial legislation* or *legislative jurisdiction*. (*f*)

Obviously such judicial legislation is to be essentially distinguished from legislation that relates to the administration of the government in other than judicial matters; such, for instance, as legislation for the support of the government and its defense from external and from internal aggression, for the administration of its finances and other property, for regulating the election and the duties of officers, and for education, the support of the poor, and other such matters; which may with propriety be termed *administrative* legislation; for, with regard to the latter, the government is vested with the function, and the right, within certain limits, of adopting any means which it may deem most conducive to the efficient administration of government, and the maxim applies, "*Voluntas stet pro ratione;*" but with regard to the former, it performs, in effect, the function of a judge, and should be governed solely by the consideration of what is just and equal between men. Or, in other words, the object of *administrative* legislation extends, within appropriate limits, to the promotion of the welfare of the people generally; while that of *judicial* legislation extends only to the promotion of their welfare in a particular way, viz, by causing justice to be observed; and in the exercise of this function the maxim, "*Judicis est jus dicere non dare,*" is equally applicable to the legislator as to the ordinary judge. Thus, for instance, a law declaring that, in each of the class of cases determined by its provisions, an obligation shall arise to transfer property, or to render services to another, is obviously a declaration of the judgment, and not merely of the will, of the legislator, or, in other words, is an exercise of the judicial function; and, on the other hand, if there be no pretense of natural obligation, corresponding to the burden thus imposed, the law would be essentially unjust, and, therefore, not a legitimate exercise either of the *judicial* or of the *legislative* function; and it would also be in conflict with the Constitutional provision that no man shall be deprived of life, liberty, or property, except by due process of law. Hence it cannot be doubted that the function of *judicial legislation* is essentially identical with that of jurisdiction in the ordinary sense, and that, whether called upon to determine particular controversies presented for decision, or to determine classes of cases, in advance, by establishing rules for their decision, the function of the State is simply that of a judge, or umpire, and that justice constitutes the only admissible principle of decision. For it would be a monstrous proposition to assert that it is the function of government to establish, in the comparatively few cases that are presented to it for decision, a set of principles different from those principles of justice by which honest men, and indeed men in general, hold themselves to be

bound, and by which, in the great majority of cases, their mutual claims and demands upon each other are habitually and voluntarily regulated by themselves.

§ 32. *Another Division of the Functions of Government.*

We will, therefore, for the purpose of marking this distinction, regard the function of *judicial* legislation, or *legislative jurisdiction*, as part of the judicial function, and the function of legislation as including only that of *administrative* legislation. Our divisions of the functions of government will then stand thus, viz.: (1) The governmental, or so called executive function; (2) the legislative function, including only that of administrative legislation: and (3) the judicial function, including that of legislative jurisdiction.

§ 33. *Of the Twofold Division of the Function of Government.*

But even this, perhaps, may be improved. For, if attentively considered, the *legislative*, seems to belong properly to the *administrative* function; of which the two special functions, namely, the legislative and the governmental, appear to be merely different modes of exercising the same general function, rather than as themselves being essentially distinct. For, precisely as, in individual life, the conduct of men, in matters not governed by moral considerations, is directed partly by general rules founded on experience, and partly by particular judgments formed upon the occasion as it presents itself, so the State, in matters non-judicial, will find it necessary sometimes to govern its conduct by general rules or laws, and sometimes by the suggestions of the particular occasion; but in both cases, the end in view, and the corresponding function, is the same, namely, the efficient administration of its affairs. It is indeed obviously expedient that the administrative functions should be divided into the *legislative* and *governmental;* but the ends of both are the same, namely, to administer the *non-judicial* affairs of the State, and the difference is merely in the mode of effecting this end. We must, therefore, I think, regard the tripartite division of the functions of government as erroneous, or, rather, inaccurate, and adopt the twofold division, namely, into the *judicial* and the *administrative* functions, distributing—as will be explained more fully when we come to treat of the organization of the government—the function of *legislative jurisdiction* to the former and that of *administrative legislation* to the latter. And this division of the functions of government, it will be found, is theoretically confirmed by a consideration of the ends of government, and historically by a consideration of its primitive organization, and of the subsequent development of the judicial function and of the law.

§ 34. *Theoretical and Historical Argument in Support of this Division.*

The ends of the State were considered in the preceding chapter, and it was there shown that there are only two theories with regard thereto

that are worthy of consideration. The first of these is the strict judicial theory that regards the administration of justice, not only as the principal, but as the sole, end of the State; the other admits that this is the principal end of government, but holds that, in subordination to this function, and, so far as may be consistent therewith, it also comes within its end, and consequently its function, when necessary, to supervise, protect and encourage the natural development of society. The former, that is, the judicial function, being the essential and paramount end of government, should obviously be regarded as essentially distinct from all others, which must be held merely subordinate. The exercise of this function, however, obviously demands the existence of a government, and the administration of its powers and resources, both with regard to its external and its internal relations; and, in this administration, it may be admitted that the general welfare of the community may be legitimately considered; but this, as we have seen, is a merely incidental or unessential end, which, in itself, would not be sufficient to justify the existence of government. Hence, the functions of government should, in the first instance, be divided into (1) the essential and paramount function of causing justice to be observed—which may be called either the *judicial* function or the *function of jurisdiction;* and (2) the subordinate functions of government; all of which are included under what we have called the administrative function. The last should be divided into the *legislative* and the *governmental* functions; and a corresponding division should be made of the first, namely, into the function of *legislative* jurisdiction, and that of *ordinary* jurisdiction.

This accords precisely with the organization of the primitive State, in which the king, apart from his character of military and administrative chief, is regarded merely as judge, and the necessity of legislation is not even conceived of (*g*); and it also accords with the subsequent development of the law, which has mainly been the result of the exercise of the judicial function, and in which legislation has had but small part. We perceive, therefore, that our twofold division of the sovereign functions of the State into the *judicial,* and the *administrative* function, and especially the distinction made by us between *judicial,* and *administrative* legislation, is not only suggested to us by a consideration of the legitimate ends of the government, and also, historically, by the primitive constitution of the State, but that is also confirmed in the historical development of the law.

§ 35. *Of the Judicial Function of the Government.*

With regard to the judicial function, therefore, its province may be readily determined. It includes, as we have observed, the functions both of *legislative,* and of *ordinary jurisdiction;* and in the exercise of either of these functions the same principle should be applied, as to all other functions of the government, namely, that they should be exercised only in aid of the natural development of society, to which the

interference of government should be merely ancillary, and not in such a manner as to interfere with its natural progress.

In applying this principle, the first phenomenon that should attract our attention is that the observance of justice is, in the main, provided for by nature itself. Men living in society inevitably conceive certain notions of justice, and of right and wrong, and these, by a process of nature that appears to be necessary in its action, become common or universal; and thus, as we have seen, is created the received or positive right of the people; which, in general, covers nearly the whole field of jural relations; and which is, in the main, a correct expression of the principles of natural justice, as theoretically defined; and which, also, is the practical standard which men ought to observe, and to which, by an impulse of nature, they involuntarily submit; and it is this which constitutes the means by which society, and government, and even civilization, become possible.

Hence—as the development of the theory and principles of right is, in the main, like the rest of the development of society, natural and spontaneous—it follows, as an application of the organic theory, that the function of judicial legislation is merely supplemental to natural functions; that it does not extend to the abrogation of the principles of natural justice, but merely to protecting them, and to encouraging and directing their natural development to such extent as necessity may demand, and no further.

With regard to the function of ordinary jurisdiction, a few additional observations will be necessary. Jurisdiction is of two kinds, namely, *civil*, and *criminal*,—the former consisting in the power to hear and determine controversies between individuals as to their mutual rights; the latter in the power to hear and determine accusations of crime, which, so far forth as they enter into the domain of jurisdiction, are merely controversies between individuals and the State.

The *criminal* jurisdiction will first be considered. The right of punishment is based exclusively on the right of self-defense, which is necessarily vested in the government as it is in the individual, (*Vim vi repellere omnia jura clamant*). It is, therefore, in its essential nature, merely the war power exerted against internal enemies; for the criminal is in fact at war with the State. The right, therefore, is strictly limited by necessity, which is its only justification, (*Salus populi suprema lex*), and, in its essential nature, it is the same as the right in war over captured enemies. The State, therefore, has no right to inflict punishment by way of retribution, or for the purpose of reforming the criminal, but merely for the purpose of the prevention of crime by example of punishment or by actual restraint. I do not say, it will be observed, that the functions of the State do not extend to the reformation of the criminal, but only that the justification of such a function does not rest upon the right of punishment.

The right, therefore, extends no further than to inflict the punishment

demanded by the necessity of preventing crime. Beyond this, the State has no right over the person, the property, or the labor of the convict; and hence the practice, universal in our penal system, of compelling the convict to labor for the benefit of the State, is as unjust as it is unwise. For, in the one aspect, it takes from the convict the incentive of exertion, and thus destroys almost the only practical means of reformation; and, on the other, it constitutes an unnecessary and unjust conversion of the person, the labor, and the property of the citizen to the use of the State, and thus by impressing upon him the fact that justice is something with which, in the view of society, he has no concern, still further corrupts the sentiment of justice in the heart of the convict. Nor is this injustice excused by the fact that no profit results to the State from the policy, or, in other words, that the business does not pay; but rather, on this account, we may say, to use the somewhat immortal language of the diplomatist: "It is worse than a crime; it is a blunder."

The question of punishment is not a *judicial* one, but pertains to the *governmental* power; but before the right to punish can accrue, a question of *jurisdiction* must necessarily arise, namely, to determine whether the accused is guilty of the crime charged; which, as we have observed, is a controversy between the individual and the government, affecting the private rights of the former, and hence essentially similar in character to controversies between individuals. For every penal prosecution is in effect a suit by the State to establish a right over the person of the accused.

With regard to the civil jurisdiction, it may be said that there is no other power or function of government of which the nature, end, and mode of exercise is, in this country and England, and in these latter days, so thoroughly and generally misunderstood. Briefly, the function is precisely what the etymology of the term, *jurisdiction*, indicates, namely, to declare *the right* between men, in controversies presented to the courts for determination,* but, as commonly conceived, it is merely the power or authority to declare the legislative will with regard to the controversy. This—while as a universal proposition utterly false—is, to a certain extent, true; for there are many matters that are within the right of the legislator to determine, and as to these, when its will is declared, justice requires it should be observed, and hence the function of administering justice necessarily includes the obligation or duty to observe all valid laws. But, as we have seen, judicial legislation, even in modern times, is extremely limited in its scope, and laws and statutes therefore constitute but an infinitesimal part of the principles by which, in practice, rights are determined. It is, indeed, as we have seen, asserted by Austin and others, that the courts are in fact vested with legislative power; and that their

* "Jurisdiction, *jurisdictio:* an authority or power which a man hath to do justice in causes of complaint brought before him," *Jacob's Law Dictionary.*

decisions, being precedents for future cases, are, in their essential nature, laws differing in nothing from statutes, except in the mode of expression; (*h*) and hence, that the law is a mere expression of the will of the State, consisting exclusively of laws or statutes, enacted either by the ordinary legislature or the judges; but this proposition is manifestly untenable; and, as fortunately the subject will be more or less familiar to the reader, it will therefore be sufficient on these points to observe that the proposition is opposed to the uniform opinion of the jurists, both of our own and of the Roman law, as embodied in the maxim, *Judicis est jus dicere, non dare;* and that it is in conflict with the rule of *stare decisis*, as uniformly interpreted by the authorities of either law. (*i*) The effect of judicial decisions, so far as they are binding in the courts, is simply that accorded to custom generally. If they have entered into the life and mode of business of the people, or, in other words, have become part of their general customs, they must in general be observed; and hence the validity of precedents rests upon precisely the same grounds as does that of customs, which are to be observed only when it is reasonable or just that they should be.

Beyond this—on the principle, "*Cuilibet in sua arte perito*"—judicial decisions and the opinions of jurists carry with them, as do those of experts in all branches of knowledge, a certain authority; but in the law, as elsewhere, authority is to be regarded as a mere aid in arriving at truth, and can in no case be held conclusive. Naturally, every judge will avail himself of the labors of other judges when questions investigated by them come before him; and he is bound to give their views a respectful consideration; but the weight of the authority will vary in all cases, according to the learning and ability of its author, and the cogency of his reasoning; and in all cases, except where the decision has passed into custom and become an accepted canon of property and conduct, the judge is bound to reject it, if, in his opinion, it is clearly erroneous.

§ 36. *Of the Administrative Function.*

With regard to the administrative function, its nature, and the various modes of its operation, the subject is too extensive to be entered at length upon here. It is sufficiently defined, however, as including all the functions of government that do not properly belong to the judicial function; that is, either to the function of ***ordinary*** or to that of ***legislative*** jurisdiction; and it is to be subdivided into the ***legislative*** and the ***governmental*** functions. As to the precise division between these it must be determined by practical considerations, as there is, or at least I know of no principle by which they can be sharply distinguished. The subject, therefore, will belong more properly to the subject of political organization.

§ 37. *Of the Function of Political Organization.*

One of the advantages of the above division of political functions is that it enables us to separate clearly the organic function, or function of political organization, from the functions of the ordinary government. The exercise of this function is illustrated by its practical workings in the Constitutions of this country, and, from this, has come to be generally recognized as an essentially distinct function by European jurists. The practical mode in which it is usually exercised is too familiar to us in this country to require any explanation, and it will, therefore, be sufficient to say of it that the principles which should govern its exercise are simply those of natural right, and, subordinately to these, considerations of the common welfare.

NOTES.

(*a*) "Now in all States there are three particulars, in which the careful legislator ought well to consider what is expedient to each form of government; and if these are in a proper condition, the State must necessarily prosper; and according to the variation of each of these, one State will differ from the other. The first of these is the assembly for public affairs; the second, the officers of the State (that is, who they ought to be, and with what power they should be invested, and in what manner they should be appointed); and the third, the judicial department" (*Politics*, Chap. xiv).

(*b*) *Esprit des Lois*, Bk. xi, Chap. vi, a work that has had an immense influence on political thought, and is still very entertaining reading, but which has no pretensions, or, at least, no just pretensions, to the character of science. A better title for it, it has been suggested, would have been, *Esprit sur Lois.*

(*c*) *Constitution U. S.*, Art. i, ii and iii; *Constitution Cal.*, Art. iii, Sect. 1. See also the Constitutions of other States.

(*d*) This error, with many others, is exemplified by Kant: "Every State contains in itself THREE POWERS, the universal, united will of the people being thus personified in a political triad. These are *the legislative power, the executive power* and *the judiciary power:* (1) The legislative power or the sovereignty in the State is embodied in the person of the lawgiver; (2) the executive power is embodied in the person of the ruler who administers the law; and (3) the judiciary power, embodied in the person of the judge, is the function of assigning every one what is his own, according to the law (*Potestas legislatoria, rectoria et judiciaria*). These three powers may be compared to the three propositions in a practical syllogism: The major, as the sumption, laying down the universal law of a will; the minor presenting the *command* applicable to an action according to the law, as the principle of the subsumption, and the conclusion containing the sentence or judgment of right in the particular case under consideration" (*Philosophy of Law*, p. 165).

We add Mr. Bluntschli's view of this position: "Another error which is almost childish, is that which treats the organism of the State as a logical syllogism: the legislative power determining the rule or major premise, the judicial power subsuming a particular case under it (minor premise), while the executive carries out the conclusion. All the functions of the different powers would thus be united in every judicial decision, and government would be only the policeman to execute this judgment" (*Theory of the State*, p. 520).

(*e*) "This theory, according to which three powers are admitted, namely, the legislative, the executive, and the judicial, was propagated by Montesquieu, who believed that he had derived it from the Constitution of England. But the Constitution of that country did not recognize such a separation of powers, since the king is there an integral part of the parliament. . . . . But, as the theory of Montesquieu, adopted even in England (Blackstone), did not respond to the political reality, which presented in the royal power something more than a power purely executive, it was found necessary to complete it by the theory of the *royal prerogative*, which is useless when the governmental power of the State is well understood. . . . . We see also that in France, during the first revolution, Clermont Tonnerre, and, later, B. Constant, sought to complete the theory by the doctrine of a fourth power, called the *royal* power; and in Germany, there is generally added to the three powers an *inspective* power, which is equally comprehended, as we shall see, in the just notion of the *governmental* power—such as exists in democracies as well as in monarchies."

B. Constant says, in his *Cours de Politique Constitutionelle:*

"It will be regarded as strange, that I distinguish the royal power from the executive power. This distinction, always misconceived, is very important; it is, perhaps, the key to all political organization. I do not claim the honor of having invented it; the germ is to be found in the writings of a man who perished during our troubles" (*ib.*, note).

"There is, then," continues Mr. Ahrens, "in the State, a governmental function, or power, of which the peculiar functions consist essentially in giving impulse and direction to the public life, in inspecting and supervising the social movement, in keeping itself in touch with its needs, in exercising the initiative in legislation, and in administration, in representing the State in its international relations, and in constituting the point of union and connection for all the other powers and their principal functions. For this last and important need, the government ought to participate in legislation, by exercising an initiative, and by a veto, either absolute or at least suspensive. Likewise the government inspects and supervises the juridical functions, and directs directly the administration" (*Cours de Droit Naturel*, p. 357).

"Government or Administration (*Regierungsgewalt*). The usual expression, 'Executive (*vollziehende*) power,' is unfortunate, and is the source of a number of errors, misunderstandings in theory, and mistakes in practice. It neither expresses the essential character of government, nor its relation to legislation and the judicial power. . . . .

"The essence of government consists rather in the power of commanding in particular matters what is just and useful, and in the power of protecting the country and the nation from particular attacks and dangers, of representing it, and guarding against common evils. It consists especially in what the Greeks call the Roman's *imperium*, the Germans of the Middle Ages *Mundschaft* and *Vogtei* (*tutelle* and *baillage*). Of all other powers government is the ruling, and, without doubt, the highest, being related to the others as the head to the limbs of the body. It includes what is called the *representative power*" (Bluntschli, *Theory of the State*, p. 521).

(*f*) "The judicial (*richterliche*) power is often regarded as the power which judges (*urtheilen*)—a confusion which is favored by the French (and English) expressions (*pouvoir judiciaére*). But the essence of judicial power consists not in judging (*urtheilen*), but in laying down the law (*richten*), or, according to the Roman expression, not *in judicio*, but *in jure*. 'Judging,' in the sense of recognizing and declaring the justice in particular cases, is not necessarily a function of government, nor the exercise of a public power. In Rome it was commonly entrusted to private persons as *judices*, in mediæval Germany to the assessors (*Schoffen*), not the judges (*Richter*). In modern times it is often entrusted to popular juries. Maintaining the law, on the other hand, and protecting the rights of individuals and of the community, has always been considered as a magisterial function" (Bluntschli, *Theory of the State*, p. 523).

These observations are just: except that I do not see that the English expression, "the *judicial* power," or the corresponding French expression, is open to objection. Etymologically it precisely expresses the idea of Mr. Bluntschli.

(*g*) "It is certain," says Sir Henry Maine, "that in the infancy of mankind, no sort of legislator, nor even a distinct author of law, is contemplated or conceived of." "Zeus,

or the human king on earth," says Mr. Grote in his *History of Greece*, "is not a lawmaker but a judge" (*Ancient Law*, Chap. i). Hence, in the history of nations, legislation is a phenomenon of comparatively late appearance, coming into existence only as its necessity, as a curb upon irresponsible power, becomes developed.

This ancient view of the function of government was well expressed in the cry of the Israelites to Samuel: 1 Sam., chap. viii. 19, 20:

"Nay, but we will have a king over us, that we may be like all the nations, and that our king may judge us, and go out before us, and fight our battles."

(*h*) The doctrine of Austin may, however, be briefly refuted by considering the consequences logically involved in it. It is avowedly founded on the rule of *stare decisis*, of which, indeed, it purports to be but an expression. It will therefore apply to the decisions of the courts on the construction and effect of statutes, equally as to their decisions on other questions. Whatever doubts and conflicts may have arisen with reference to the application of the rule in other respects, it has never been suggested that there is any distinction to be made between its application to acts of the legislature, or ordinary statutes, and its application to rules otherwise established. Hence it follows that the ordinary legislature cannot enact a valid law as to matters of private right; for such law, or supposed law, cannot be enforced otherwise than by the courts, and is, therefore, without a sanction—which, according to the theory, is an essential element of a true law—until it be so recognized; and, if the courts fail to recognize it, or give it an erroneous construction, it can never become law. In this respect, statutes stand in precisely the same category as customs or principles of natural right, which, according to the theory, cannot become law until adopted by the courts.

Nor can there be any law of any kind binding on the judges. For, being vested with legislative power, they can, if they please, disregard the decisions of their predecessors, not only with impunity, but without blame. For the legislative power is, in its essential nature, an arbitrary power, and to be exercised according to the maxim, *voluntas stet pro ratione*, and the rule applies, *leges posteriores abrogant priores*.

Hence, as the ultimate consequence of the doctrine, we must conclude that law is in fact impossible, and that the sole standard of men's rights must always consist in the fluctuating and unforeseeable opinions, or rather decisions, of the courts; and this, in fact, it is to be apprehended, is something like the condition to which the influence of this pernicious doctrine upon modern lawyers has reduced the law in this country at the present day.

(*i*) The doctrine of our own law is thus expressed by approved authorities: "Even a series of decisions," says Chancellor Kent, "are not always conclusive evidence of the law, and the revision of a decision very often resolved itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule and the extent of property to be affected by a change in it. Lord Mansfield frequently observed that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet perhaps no English judge ever made greater innovations or improvements in the law, or felt himself less embarrassed with the disposition of the older cases when they came in his way to impede the operation of his enlightened and cultivated judgment." "The law of England," he observed, "would be an absurd science, were it founded upon precedents only" (1 *Kent's Com.*, 47).

As is said by Chancellor Wentworth, speaking of this maxim: "While another maxim —*humanum est errare*—remains true, there must occasionally be a reconsideration and overruling of former judgments. If on a reëxamination the former error is clear, our duty is plain; we must be, as Lord Coke said Sir John Fortescue was, 'not amongst the number of those *qui suos amassent errores*, but one of those who yielded to the truth when he found it'" (Preface to 10 *Coke*).

The function of the judge is thus admirably explained by Hobbes: "The interpretation of the law of nature is the sentence of the judge constituted by the sovereign authority to hear and determine such controversies as depend thereon, and consisteth in the application of the law to the present case. For, in the act of judicature the judge doth

no more but consider whether the demand of the party be consonant to natural reason and equity; and the sentence he giveth is, therefore, the interpretation of the law of nature; which interpretation is authentic, because he giveth it by authority of the sovereign, whereby it becomes the sovereign's sentence, which is law for that time for the parties pleading.

"But, because there is no judge, subordinate nor sovereign, but may err in a judgment of equity, if, afterwards, in another case, he finds it more consonant to equity to give a contrary sentence, he is obliged to do it. No man's error becomes his own law, nor obliges him to persist in it. Neither, for the same reason, becomes it a law to other judges, though sworn to follow it. For, though a wrong sentence given by authority of the sovereign, if he know and allow it, in such laws as are mutable, be a constitution of a new law in cases in which every little circumstance is the same, yet in laws immutable, such as are the laws of nature, they are not laws to the same, or other judges, in like cases, forever after. Princes succeed one another; and one judge passeth, another cometh; nay, heaven and earth shall pass; but not one tittle of the law of nature shall pass, for it is the eternal law of God. Therefore, all the sentences of precedent judges that have ever been, cannot, all together, make a law contrary to natural equity; nor any example of former judges can warrant an unreasonable sentence, or discharge the present judge of studying what is equity, in the case he is to judge, from the principles of his own natural reason" (*Leviathan*, pp. 123, 129).

We may, therefore, with Mackeldey, adopt for our motto the sentence of Cujacius: "*Utinam qui hoc tempore jus nostrum interpretantur, Papianum imitati, quæ vel falso vel inepte aliquando et senserint, et scripserint ingenue retractent; nec eis, contra quampostea resciverint, tam obstinato tam que obfirmatio animo (uti facuint) perseverent*" (Kaufman's *Mackeldey*, Preface).

CHAPTER IV.

Of the Nature and Method of Jurisprudence.

§ 38. *Public Right a Branch of Jurisprudence or the Science of Rights.*

The subject of the rights of the State, or public right, does not in itself constitute a complete and independent subject of investigation, but merely a division or part of a more general subject, namely, the science of rights or justice, or, as it is more commonly called in our language, Right, and in other languages, *Recht, Droit, Diritto, Derecho,* etc. Some observations on this subject will therefore be required before entering upon the immediate subject of our investigations, which is, the rights of the State. These will be found in this and the following chapter.

The term, Right, like its foreign equivalents, denotes rather the subject of the science—*i. e.*, rights in the aggregate—than the science itself, and its use in the sense above given is, therefore, to some extent inaccurate. On this account it is desirable to use some other term that, like the German *Rechtslere,* may more accurately denote the science itself; and for this purpose no other can be suggested than the term, Jurisprudence, which—though of late years it has, in our language, drifted somewhat from its meaning—is now generally thus used in other languages and not uncommonly in our own.

Etymologically the term Jurisprudence denotes merely the science or doctrine of *jus;* but the latter term—like its equivalents, *right, recht, droit, diritto, derecho,* etc.—is commonly used to denote not only theoretical right, but also positive right, or right actually realized in the State by means of the law; and the term Jurisprudence necessarily presents a corresponding ambiguity. The latter use of the term is, indeed, in our language, the most common; and hence with us the term Jurisprudence is generally regarded as belonging exclusively to positive right, or, as we call it, the law; and its application to theoretical right seems to carry with it some appearance of impropriety. On this account it has become a common usage to distinguish theoretical from positive jurisprudence by calling the former *natural* jurisprudence; and to this usage, where necessary to avoid confusion, no objection can be made. But in this work, unless the contrary is expressed, we uniformly use the term in the sense of theoretical or natural jurisprudence.

§ 39. *Division of Jurisprudence or Right.*

The term Right, as we have observed, is but an expression for rights in the aggregate, and it may relate either to private or individual rights

or to the rights of the State. Accordingly, right is divided into two parts, called respectively, after the Roman jurists, private right (*jus privatum*) and public right (*jus publicum*), the former of which deals with private rights, the latter with the rights of the State.

Public right is commonly regarded as referring only to the rights of the State as against its subjects, or, as they may be called, its internal rights; but according to its real sense, and the definition given of it, it would seem to include also the external rights of the State, or the rights of the State as against other States. But the latter constitute the subject matter of International Right, or the Right or Law of Nations (*jus gentium*), which, for many reasons, it will be better to consider as an independent subject of investigation. Jurisprudence will, therefore, be regarded in our present investigation as dealing with three subjects, namely, (1) Private Right; (2) Public Right, regarded as denoting the internal rights of the State; and (3) International Right, or the right or law of nations. The last two constitute the peculiar subject matter of the theory of the State.

§ 40. *Jurisprudence or Right, a Department of Morality.*

But Right itself, or Jurisprudence, is but a branch of a more extensive science, namely, Morality or Ethics, which comprehends not only the subject of duties but also that of rights or justice. The latter subject is indeed so broadly distinguished from the rest of Morality that it may with convenience be considered independently; but its connection with Morality generally must be borne in mind, if for no other purpose than that of realizing the fact that the problem of rights, private and public, is purely a problem of Morality, or of right and wrong. For the term Right carries with it as an essential part of its signification or connotation the quality of rightness, and hence, *ex vi termini*, all rights are moral rights, and there can no more be a right of any other kind than there can be a two-sided triangle or a square circle. Hence, in inquiring as to the nature and extent of the powers of the State, the subject of our investigation is not the mere historical problem of defining the actual powers that are or have been exercised by different governments, but, in the accurate and profound language of Hobbes, it is to determine "what are the rights or just power or authority of a sovereign." *

§ 41. *Morality Distinguished from the Philosophy of Morality.*

But at this point we are confronted by an apparently formidable problem, namely, the metaphysical problem as to the nature of the distinction between right and wrong. This subject is one of great importance and of absorbing interest to the philosophic mind; but fortunately the solution of the problem is unnecessary to the jurist or the

* *Leviathan*, Introduction.

moralist, whose task is to determine, not the abstract nature of the quality of rightness, but its presence or absence in given cases. Hence the question of the abstract nature of the distinction between right and wrong belongs rather to the Metaphysics of Morality than to Morality itself, which is concerned only with a practical question of determining as to the rectitude of human conduct. To assert that the solution of this question must abide the solution of the metaphysical problem—hitherto unsolved, and of which, as of other metaphysical questions, there appears no promise of a solution—would be in effect to assert in the face of history that man is incapable of moral development, and, consequently, of civilization. But, on the contrary, it is manifest that the metaphysical problem was itself suggested by the previously existing moral judgments of mankind, and could not present itself as a distinct subject of inquiry until Morality had already been highly developed. Similarly, men reason without understanding logic, and logic itself must be developed before the metaphysical question as to the ultimate grounds of human knowledge can arise. But, as Locke says, "God did not make man a mere two-legged animal and leave it to Aristotle to make him a reasonable creature." And with like reason it may be said that fortunately it has not been left to the metaphysicians to make him a moral being.

There is also another interesting problem that seems to touch upon the subject of our investigations, namely, the psychological problem as to the faculty or faculties by which moral obligations and the necessity of observing them are perceived. But this, also—though more susceptible of solution than the metaphysical problem—does not fall within the scope of our inquiry, but belongs rather to the Philosophy of Morality than to Morality itself. For our task is to determine neither the abstract nature of the quality of rightness, nor the nature of the faculty by which we perceive the obligation to conform to it, but merely the rectitude of this or that course of human conduct; and in this investigation it is manifestly indifferent what metaphysical or psychological theory we adopt, provided only it assert the reality of moral distinctions and the possibility of perceiving them.

It will be sufficient, therefore, to say that we use the terms, right and wrong, in their ordinary and familiar acceptation, as denoting a universal and apparently necessary conception of the human consciousness, and that the reader is at liberty to adopt a more specific definition, according to the theory to which he may incline—as, for instance, that it consists in conformity to the will of God, or to nature, or to the universal order, or to the end or destiny of man, or to general utility, or the welfare of mankind.

The above considerations, though sufficiently obvious, have not generally been observed; and through this neglect have resulted the most deleterious consequences to Jurisprudence and to Morality generally. For to inquirers on these subjects almost the first questions that present

themselves are the metaphysical and psychological problems, and these seem imperatively to demand a solution and almost invariably to absorb the attention of the inquirer. The result is that some waste their labors in the production of unsatisfactory theories, and others, discouraged by failure and impatient to approach the practical questions involved, cut the Gordian knot by denying the existence of any material distinction between right and wrong. Of the latter, the most conspicuous instance is presented by the theory of Bentham and Austin and of the modern English school of jurists, which is based wholly upon the assumption that the distinction between the just and the unjust is merely of human imposition.

§ 42. *Of the Moral Standard.*

Questions of right and wrong, in the concrete, present in general but little difficulty, and consequently there is a remarkable unanimity in the moral judgments of men in the same state of civilization, and even in different ages and countries, with reference to what may be called the fundamentals of morality. No one, for instance, can contemplate the crime of murder or robbery without disapprobation; or, to refer to less extreme cases, there are none who will deny the obligation to return a deposit, or to compensate for an injury, or to repay a loan. These and similar principles are universally admitted, and in fact furnish the crucial test by which all theories of morality are to be judged, and to which the advocates of all theories appeal. But the difficulty consists in expressing satisfactorily the ultimate test or criterion by which conduct is to be judged; and on this point the widest difference of opinion exists. To me, however, it seems that the solution of the problem is to be found in the consideration that there are, in fact, two standards intimately related, but between which it is necessary to distinguish, namely, the *theoretical* and the *practical*, the former consisting in rational principles by which our judgments should be formed and our conduct governed so far as it may affect ourselves only; the latter, —as we have explained—in the common moral convictions, or general conscience, or, in other words, the positive morality of the community, by which, in matters affecting others, our conduct ought to be determined. These standards are not antagonistic, or even entirely independent of each other. For, on the one hand, it is a manifest principle of theoretical morality that the established morality should be observed; and, on the other, such is the constitution of human nature, that, just as the cannon ball nearly coincides with the trajectory curve as scientifically determined, so *positive* tends to conform, and in civilized countries substantially conforms to *theoretical* morality. The former has already been considered,* and it only remains, therefore, to consider the latter.

* *Supra*, p. 236.

§ 43. *Of the Theoretical or Rational Standard.*

With regard to the theoretical standard, it is obvious that reason is the sovereign judge of conduct, and that all assumed principles of morality must be submitted to the test of its judgment. Hence the standard of right and wrong must consist of principles or propositions derived either from intuitive reason or from the rational investigation of the nature of man and of his environments and experience. (*a*)

Of these principles—besides that of Liberty, which will be fully considered hereafter—there are two, more general in their character and application than others, that may be conveniently considered here, namely, the principle of Necessity and that of Utility. The former is rudely expressed in the maxim, *Salus populi suprema lex*, and may be more accurately expressed in the proposition that whatever is essential or necessary to the existence and well-being of man or society is at once right and obligatory; the latter, in the proposition that whatever conduces to the welfare or happiness of mankind is, if not obligatory, at least right.

(1) Of the two principles, that of Necessity, though less extensive in its scope, is of the greater practical utility, and from it, as we shall see, nearly all the admitted principles of political science are derived. It may, therefore, be said to constitute the foundation of the science.

(2) The principle of Utility, in the form in which it has been generally asserted—namely, that of Utilitarianism—is altogether without definite signification, and cannot either be accepted as true or asserted to be altogether false; but it may be asserted of it, as of indefinite theories generally, that its influence, both in theory and in practice, upon political science and morality, has been greatly deleterious. It will, therefore, be necessary to determine accurately the signification of the principle of Utility, and to inquire how far it may be accepted as a rule of right.

To say that anything is useful is, in itself, altogether unmeaning. To give the expression definite signification it must be stated for what and to whom it is useful. Leaving out of view the former problem—which, it may be said in passing, involves the whole subject of the destiny of man and the end of human conduct—it is obvious that the term *useful*, or *utility*, is a relative term, implying some man or men whose utility is considered, and that its meaning must differ essentially according to the correlative to which it is applied. Thus, obviously, the mere private utility of the individual cannot be adopted as the test; and we must also reject the principle that the happiness of the majority or the greatest good of the greatest number is to determine; for it cannot be asserted that it is right that the happiness of any innocent man should be sacrificed to that of any other man or men, except in cases where there is an obligation on his part to submit to such sacrifice and a corresponding right of such others to exact it. We must also reject the theory of utility as commonly received, which is that *general* utility is

the test. For the term *general* utility is indefinite, and we cannot determine from it the number or class of individuals whose welfare is to be considered.

There remains, therefore, but one form of the principle to be considered, which is that the happiness or welfare of all—that is, of every individual—must be accepted as the test of right, and which may, therefore, be called the theory of universal utility; and this, indeed, is the only form in which the principle is not obviously false. For to assert that anything is useful to the community, or to mankind, or to any other class, is to assert that it is useful to every individual of the class referred to. Otherwise, if we speak correctly, we must specify the individuals or class of individuals to which the proposition is intended to apply; as, for instance, that it will be useful to a majority, or to two-thirds, or three-fourths, or to some other proportion. Hence the only form in which the principle can be received is that in which it asserts that whatever tends to the welfare of every individual in the community must be accepted as right. But even in this form the proposition is still indefinite. For when we speak of any course of conduct as right, we may mean either that it is imperatively right, or obligatory, or that it is merely permissibly right, *i. e.*, not wrong. In the latter sense the proposition expresses, not the notion of duty, but merely that of liberty. In the former it expresses the notion of obligation, and in this sense I can conceive of no principle on which the proposition can be asserted to be true.

It is, however, assumed in all theories of morality that the observance of right must necessarily tend to the happiness and welfare of the individual and of mankind generally. And from this it may be inferred that the welfare of mankind is a necessary consequence of right conduct, and, therefore, if not of the essence, at least a property of right; and hence, that whatever is pernicious to any one is wrong. The principle of utility, therefore, in this its negative form—that is, as asserting that whatever is pernicious or detrimental to mankind is to be regarded as wrong—must be accepted; and in this form its principal use is in correcting mistakes of mankind made in pursuance of some fancied utility. The principle, in this form, is embodied under the name of the *Argumentum ab inconvenienti*, in one of the fundamental maxims of the law, and there are few principles of more practical utility to the jurists. As given by Coke, the maxim is: *Argumentum ab inconvenienti plurimum valet in lege.* And he adds: "The law that is the perfection of reason cannot suffer anything that is inconvenient;" and therefore he says, "*Nihil quod est inconveniens est licitum*, and judges are to judge of inconvenience as of things unlawful."

It is, of course, to be observed that in considering the question of utility regard must be had, not to particular, but to general consequences; or, in other words, not to the effect of the particular decision, but to the effect of the general rule. For what is right or wrong, just

or unjust, in one case must be so in like cases; and hence right, as well as morality generally, must consist of general rules applying to all cases of the same class. This is insisted upon by all moralists, and is but a statement of Kant's Categorical Imperative: "Act according to a maxim which at the same time can be adopted as a universal law."

§ 45. *Of the Method and General Principles of Jurisprudence.*

It is in the highest degree important, before entering upon the subordinate subject of the rights of the State, that we should have some notion of the method and general principles of general Jurisprudence, of which the subject of Public Right constitutes only a subordinate department. It will be necessary, therefore, to give here a brief epitome of the subject. As we proceed with the work, the application and utility of the principles thus briefly stated, which at first may be obscure, will become clearly manifest.

Rights are of two kinds, namely, rights of *ownership* and rights of *obligation*. (*b*) To the former class belong the right of personal liberty and security, or of self-ownership, the right of property and the right of husband in wife and parent in child and *vice versa;* in each of which cases we may say of the subject of the right, whether one's person, property, wife, husband, parent, or child, that, to the extent of the right, it belongs to the one having the right, or that it is *his*, or his own. To the other class belong all rights to the performance of obligations, whether rising from contract, or delict, or *ex mero jure*, without the intervention of either—the term "obligation" being here used, in its strict and proper sense, as denoting a duty from one person to another, the performance of which may be rightfully exacted by the obligee or person to whom it is owed. A mere duty, without such corresponding right to exact its performance, properly speaking, is not an obligation. Thus, where one owes to another money, or has the property of another in his possession, either unlawfully or as a mere bailee, or has injuriously damaged another, there arises upon his part an obligation to pay the debt, or to restore the property, or to compensate the party injured, as the case may be; and there is also a corresponding right in such other party to exact the performance of the obligation. But the duty upon the part of a man to assist a neighbor or friend, or to perform a charitable act, is, in general, a mere duty, and not an obligation; nor is there any right upon the part of any one to exact its performance.

If we analyze the notion of a right of the former class—as, for instance, a right of property—it will be found to consist merely in the *liberty* or *power* of the owner to act freely, to the extent of the right, with regard to the thing owned, according to the dictates of his own will, and free from interference by others; and this we will find to be also true in the case of rights of obligation. For such a right, in its ultimate analysis, consists also in the liberty or power to act freely, to the extent of the right, with reference to its subject; which, in this

case, is euphoniously said to be the obligation, but is in reality the obligor himself, whose free action the obligee, by virtue of his right, has the liberty or power to control if he shall choose to do so. Hence, obviously a right consists in the liberty or power of acting (*facultas agendi*), in a specific case, or class of cases; and the aggregate of a man's rights is therefore but another expression for the general liberty to which he is justly entitled.

It is obvious, however, that the liberty or power to act, in which consists the essence of the right, is not to be understood as actual power or liberty. For it is clear, on the one hand, that a man may be prevented from exercising a right, and the right nevertheless continue to exist—as, for instance, where he is unjustly imprisoned or deprived of his property—and on the other, that he may have the actual liberty or power to interfere with the rights or liberty of another without having the right to do so. The liberty or power in which a right consists must, therefore, be understood as consisting in *rightful* or *jural* liberty or power—that is, liberty or power which he rightfully has, or which it is right that he should have.

In this definition, it will be observed, the terms "liberty" and "power" have been indifferently used. These, in a certain sense, are apparently opposed in meaning; but, in this connection, and in their strict and proper sense, are substantially synonymous—the difference between them corresponding merely to that between the terms "may" and "can," in each of which two notions are signified, namely, the absence of restraint and ability to act; for, obviously, one cannot have the liberty to act without the ability, or the ability without the liberty. Hence, in logical phrase, the difference between the terms is, that the term "liberty" denotes the absence of restraint and connotes ability to act; and conversely, the term "power" denotes the latter and connotes the former. In all cases of rights of obligation, however, the act which the owner of the right has the liberty or power to do is to coerce another, and hence there is implied in it a power or control over the obligor, and in common language this is, perhaps, the idea most prominently suggested by the term "power." But in this case, as in the case of rights *in rem*, where no control over others is necessarily implied, the term "liberty to act" is equally applicable, and, on account of the ambiguity of the term "power," is, in general, to be preferred as the more appropriate term. Accordingly, we will define a right as the *jural*, or rightful liberty to act (*facultas agendi*), in a given case or class of cases; and rights, in the aggregate, or right, as *jural* liberty, or the general liberty to which one is justly entitled.

It follows, therefore, that the ultimate problem presented by jurisprudence is to determine the extent of the rightful or *jural* liberty of the individual.

But as, in general, this liberty exists in every case in which one may not be rightfully restrained by other individuals or the State, and as

there is always a presumption in its favor, the immediate problem is to determine the exceptional cases in which the liberty of the individual may be rightfully restrained.

But the rightful liberty or power to restrain the free action of an individual, where it exists, like the liberty or power to do any other act, is, *ex vi termini*, a right; and it follows, therefore, as a fundamental principle of jurisprudence, that the rightful liberty of the individual is limited, and limited only, by the rights of other individuals or of the State.

And as the presumption is always in favor of liberty, the burden of proof is in all cases obviously upon the party asserting the right. In this respect no distinction can be made between the rights of individuals and the rights of the State; but where a right is asserted in either which derogates from the liberty of the individual, it cannot be admitted unless a sufficient reason can be given for its existence.

The propositions above stated determine what may be called "the Method of Jurisprudence." This is, in substance, the method of Hobbes, who has been followed in this respect, and in the theory of the State generally, by Kant and his followers. It is also the method of Herbert Spencer, as explained both in his *Social Statics* and *Justice*. The fundamental principle of Mr. Spencer is "that every man may claim the fullest liberty to exercise his faculties compatible with the exercise of like liberty by every other man." Or, as he elsewhere expresses it: "Every man has freedom to do all that he wills provided that he infringes not the equal freedom of any other man;" and accordingly every asserted right is to be proved "by showing that the particular exercise of the faculties referred to is possible without preventing the like exercise of faculties by other persons." (*c*)

According to Hobbes and Kant the power or right of the State is absolute or unlimited, which, as we have seen, is a manifestly untenable proposition. According to Spencer it is limited by the law of equal liberty. But this also is untenable; for the very existence of private rights, *ex vi termini*, imports an inequality of liberty. All that can be said is that the rights or rightful liberty of each is limited, and limited only, by the rights of other individuals or of the State. (*d*)

§ 46. *Of Certain Principles of Right.*

There are numerous subordinate principles bearing peculiarly upon the determination of private rights which—though not properly belonging to the immediate subject of our investigations, viz., the rights of the State—must be briefly referred to.

(1) Of these one of the most important is what may be loosely called "the law of equal liberty"—a principle uniformly asserted but not accurately expressed by jurists and philosophers. It may be formulated and demonstrated as follows:

In determining whether a right exists in any one which derogates

from the liberty of another, or, in other words, whether restraint may, in any given case, be rightfully imposed, the obvious principle suggests itself that such a right cannot be affirmed unless it can be equally affirmed of all others standing in the same jural relations; for the burden of proof lies upon him who asserts the existence of such a right, and according to the hypothesis it is impossible to assign any reason why such a right should exist in one case and not in all similar cases. The principle may, therefore, be expressed by saying that the *jural* or rightful liberty of all men *in the same case* is equal; or, in other words, that restraint cannot be rightfully imposed upon any one unless it may be equally imposed upon all others in the same case—meaning by the term "the same case" a similarity of circumstances material to the question of right. Thus, the circumstance of infancy, or of mental unsoundness, clearly distinguishes the case of the infant or *non compos* from that of the ordinary man, and so the circumstance that one has manufactured an article of personal property clearly distinguishes him from others. But obviously the principle can have no application to the State, which stands in a case peculiar to itself.

(2) Another principle is that of restitution in case of delict—*i. e.*, that where one is deprived of his property, or liberty, or other right, he should be restored to its enjoyment. And it seems equally obvious that, where restitution in kind is impracticable, restitution in value or compensation should be made, and the injured party restored, as far as possible, to his original condition.

(3) Another and most important principle is that in certain cases custom must be considered in the determination of rights. This is not only true in the case of contract, where custom is important in determining the intention of the parties, and in cases of delict, where it is important in determining the question of negligence, but it is also true generally that custom should be observed as law, and this is, in fact, its most important aspect. Its efficiency in this respect is generally attributed to the fact that it necessarily implies a general consent or agreement as to the particulars to which it relates, which is undoubtedly true. But the most important reason for its efficiency is that human nature is so constituted as to act involuntarily with reference to custom, and hence that a violation of custom must result in a disappointment of men's legitimate expectations; and on this account, and because it is also the most perfect expression of the general will, custom should have a superior efficacy to legislative enactments. And this, in fact, is substantially the case; for, with regard to private right, statutes become operative only when they conform to an existing custom or generate a new one. Otherwise they may for a while, at the expense of infinite injustice and hardship, be imperfectly enforced, but ultimately they must give way and become obsolete. Thus, if we compare the common law, or rather the arbitrary and accidental part of it (the *jus civile*), of the time of Edward III, or of Elizabeth, or even of Black-

stone, with the existing law, it will be found to have become almost altogether obsolete, and the instrumentality by which the change has been effected is almost exclusively custom. So true is the observation of Coke that "*Leges humanæ nascuntur vivunt et moriuntur.*" Hence, the assertion of Mr. Austin and his followers that custom becomes operative only when adopted by the government, cannot be maintained, but it will be nearer the truth to say that laws become operative only when they become custom, and for so long only as they continue to be so.

But custom is not conclusive in the determination of rights; for it is an obvious principle of jurisprudence that it is not to be observed unless reasonable. And hence, customs enter into the determination of rights only as an element in the problem, and their effect is to be determined by independent principles of right.

In this way custom is constantly rectified by reason, and the positive law by means of custom undergoes a rational development. Hence, the development of the law proceeds, not from the arbitrary and accidental elements in which it seems, and is commonly supposed to originate, but from justice, or reason, by which the arbitrary and accidental part of the law is slowly but surely eradicated.

(4) Another obvious principle is that of contract, which is usually expressed in the maxim *pacta quælibet servanda sunt*, "compacts are to be observed." This principle is one very generally received, and it has been thought by Hobbes, Locke, Rousseau and others, to constitute a sufficient basis for the theory of the State. But a very little consideration will be sufficient to show that the principle thus generally stated cannot be admitted. For there is no system of jurisprudence, positive or natural, that has affirmed, as a universal proposition, that contracts should be enforced. Thus, in our own law, contracts without consideration are not enforced, and in courts of equity inadequacy of consideration is regarded as sufficient reason for refusing specific performance; and in the Roman law a certain degree of inadequacy is sufficient to avoid the contract. So both in our own and in the Roman law contracts for penalties and forfeitures are not enforced. And many other instances might be cited in which the principle is not observed. (*e*)

The true principle as to the obligation of contracts would seem to be the same as that applying to the case of *delict*, namely, that no man should be permitted to be injured, or placed in a worse position by the act of another without compensation. For the same rule that would forbid any one to deprive another of his property, or liberty, by force or fraud, equally forbids him to do it by a promise, even honestly made; and the same rule of compensation would seem to apply, namely, that the injured party shall be restored by the other to his original position.

(5) There is another important element in the determination of rights, to which we will briefly refer, namely, that of laws or statutes. These are mere acts of men who are distinguished from other men only in being vested with the right of legislation, and they belong, therefore, to the

same generic class as grants, and other expressions of human will. Like private acts, therefore, they depend for their validity upon the right of the legislature over the matters to which they relate. Wherever it is within the right of the legislator to determine any matter, the expression of his will with regard to it is conclusive; and rights may, therefore, originate in legislation as in contract, or delict; but if a law is in excess of the rightful power or right of the legislator, or, to use a technical expression, is *ultra vires*, it has no more force or validity in determining rights than the act of a private individual. The existence, or non-existence of rights cannot, therefore, be affirmed from the mere enactment of laws, but must depend upon the existence of a precedent right in the legislator to determine the matter to which they relate; and this is obviously true whatever may be assumed with reference to the extent of the rights of the State. For, even if it could be assumed that the right of the State to create, or to destroy rights in private individuals is unlimited, the assumption could be justified only as a principle of natural reason, and the laws enacted by the State would thus derive their efficacy from the same principle.

Laws, in this respect, are, therefore, analogous to contracts, grants and other expressions of human will, and also to customs, and are to be regarded, not as establishing principles of right, or as entering into the definition of *jus*, or the law, but as mere elements in the problem of determining rights.

(6) Obviously the same distinction must be made between *theoretic* and *positive* jurisprudence as between *theoretic* and *positive* morality generally —the former being jurisprudence, as scientifically determined, the latter, as generally received. But the principles of jurisprudence are not only in themselves exceptionally clear and determinate, but they have been painfully and perseveringly elaborated by a long succession of great jurists and philosophers from the time of Aristotle to the present day; with the result that as to fundamentals, the conformity of theoretic and positive jurisprudence is almost perfect; and nothing more is wanting to the perfection of Positive Right, as received in modern European countries, than the accurate formulation of the fundamental principles implicitly contained in every existing system, and their logical development, and consistent application.

In conclusion, it should be observed that the difference existing between Theoretic and Positive Jurisprudence has given rise to two schools of jurists, which are known respectively as the Philosophic or Rational, and the Historical. These, in popular opinion, are often opposed, and indeed have often opposed themselves to each other; but it is obvious, that there is in fact no opposition; but that the methods of the two schools are both essential to the study of the subject, and that the true method combines them both.

The historical method, though inapplicable to theoretical jurisprudence, and other branches of pure science, is true of positive jurisprudence for the reason that general recognition constitutes in fact the es-

sential difference between the principles of positive and those of theoretical right. (*f*)

NOTES.

(*a*) As to the possibility of a moral science, see Locke, *On the Understanding*, Bk. iv, Chap. iii, Sec. 18-20, from which we extract the following: "Confident I am that if men would in the same method, and with the same indifferency, search after moral as they do after mathematical truths, they would find them to have a stronger connection one with another, and a more necessary consequence from our clear and distinct ideas, and to come nearer perfect demonstration than is commonly imagined." In the future as in the past, all progress in the moral sciences must consist in the recognition and utilization of this truth.

It is, however, to be understood that, in matters already determined by the received or positive morality of the people, it is not the function of political science directly to control the action of government, but indirectly only, by correcting and developing the general conscience; and that all the principles of theoretical jurisprudence are to be received subject to this qualification. To use the metaphor of Pindar, *Nomos* only is king, reason but his counselor.

(*b*) The two classes of rights are more commonly called, respectively, rights *in rem* and rights *in personam*.

(*c*) The proposition in the text is illustrated by the argument of Fichte, *Science of Law*, p. 137. "If," he says, "reason is to be realized in the sensuous world, it must be possible for many rational beings to live together as such; and this is permanently possible only if each free being makes it its law to limit its own freedom by the conception of freedom of all others."

(*d*) It is admitted by Mr. Spencer that he was anticipated in his theory, or rather method, by Kant; but in fact both were anticipated by Hobbes.

"Among the tracks pursued by multitudinous minds in the course of ages," says Mr. Spencer, "nearly all must have been entered upon if not explored. Hence the probability is greatly against the assumption of entire novelty in any doctrine. The remark is suggested by an instance of such an assumption erroneously made.

"The fundamental principles enunciated in the chapter entitled 'The Formula of Justice,' is one which I set forth in *Social Statistics*: 'The Conditions Essential to Human Happiness Specified and the First of Them Developed,' originally published at the close of 1850. I then supposed that I was the first to recognize the law of equal freedom as being that in which justice, as variously exemplified in the concrete, is summed up in the abstract. I was wrong, however. In the second of two articles entitled 'Mr. Herbert Spencer's Theory of Society,' published by Mr. F. W. Maitland (now Downing Professor of Law at Cambridge), in *Mind*, Vol. viii (1883), pp. 508, 509, it was pointed out that Kant had already enunciated, in other words, a similar doctrine. Not being able to read the German quotations given by Mr. Maitland, I was unable to test his statement. When, however, I again took up the subject, and reached the chapter on 'The Formula of Justice,' it became needful to ascertain definitely what were Kant's views. I found them in a recent translation (1887) by Mr. W. Hastie, entitled *The Philosophy of Law, An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right.* In this, at p. 45, occurs the sentence: 'Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonized in reality with the voluntary actions of every other Person according to a universal Law of Freedom.' And then there follows this section:

"'UNIVERSAL PRINCIPLE OF RIGHT.

"'Every Action is *right* which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the Freedom of the Will of each and all in action, according to a universal Law.

"'If, then, my action or my condition generally can co-exist with the freedom of every other, according to a universal Law, any one does me a wrong who hinders me in the performance of this action, or in the maintenance of this condition. For such a hindrance or obstruction cannot co-exist with Freedom according to universal Laws.'

"These passages make it clear that Kant had arrived at a conclusion which, if not the same as my own, is closely allied to it. It is, however, worth remarking that Kant's conception, similar though it is in nature, differs both in its origin and in its form."

(*e*) As for instance, thecase of Thornborrow *vs.* Whittaker, 2 La Rayne, 1164, where one agreed for valuable consideration, to pay two grains of rye corn on the following Monday, four on the next Monday, and so on doubling for each Monday of the year,—and the case of James *vs.* Morgan, 1 Lev., 111, approved in Chesterfield *vs.* Jansen, 1 Wils., 286-295, where one agreed to pay for a horse a barley corn for the first nail in the shoes of the horse, two barley corns for the second, and so on doubling for the whole number of twenty-four; in each of which the contract was held void.

(*f*) In accepting the theory of the historical school of jurists, however, it is not necessary for us to give in our adhesion to what is called the historical method, as applied to other subjects—as, for instance, to political economy, or other branches of political science, including theoretical jurisprudence. Thus applied, the theory, as I understand it, in effect denies the possibility of political or moral science, and, as commonly used—as, for instance, by the historical school of political economists—seems to serve merely as a pretext for repudiating the force and validity of logical reasoning. In the true method, a thorough investigation of historical phenomena is, of course, essential, for the purpose, both of ascertaining our premises, and verifying our conclusions; but its fundamental principle is that the deductions of logic are absolutely certain, and that all true reasoning is apodictic or demonstrative; and that in this respect there is no distinction between mathematical reasoning, and reasoning of other kinds. At the same time, it is equally certain that conclusions thus reached are purely hypothetical, and must, therefore, depend for their absolute truth upon the truth of the premises, and the truth of these, of course, is always a matter of historical research. The whole method of reasoning, therefore, is well expressed by Bacon in the well-known aphorism: "The syllogism consists of propositions; propositions of words; words are the signs of notions. If, therefore, the notions which form the basis of the whole be confused, and carelessly abstracted from things, there is no solidity in the superstructure; our only hope then is, in a genuine induction," (*Nov. Org.*, Bk. i., Aph. 14).

CHAPTER V.

The Subject of Jurisprudence Continued: And Herein of the Doctrine of Natural Right.

§ 47. *Of Prevailing Misconceptions as to the Nature of Natural Right.*

The subject of natural right is one of fundamental importance, and as many erroneous notions prevail with reference to it, it will require an extended consideration.

The term natural right, or natural law, is a mere translation of the *jus naturale* of the Roman lawyers; and, in the Latin, the term *jus naturæ* is precisely equivalent; but these terms are commonly translated by us by the expressions, "natural law" and "the law of nature;" and, consequently, the same ambiguity, as in the case of the law, is presented. Hence, the modern English jurists, having no other conception of law than as being merely legislation, suppose that the term law is here used in the same sense, and that to account for the existence of natural law, or the law of nature, a legislator must be supposed. (*a*) But obviously, the Roman lawyers, in speaking of natural law (*jus naturale*), which, they defined as the law, or *jus*, "which natural reason has established among all men," did not use the term, law, or *jus*, in the sense of legislation, or conceive that a legislator was implied by it; nor, so far as I know, has any one, other than the Austinian jurists, ever done so.

On the contrary, all that is implied by the term, natural right—which is but another expression for right reason—is, that there are certain natural principles, governing the jural relations of men, determined or established by reason. (*b*)

Another very common error with regard to the nature of natural right, as conceived by the Roman jurists, regards it as derived from the confessedly fictitious notion of a state of nature, or of natural society existing without government. This is the notion of Sir Henry Maine, who is commonly regarded by English jurists as having finally established the true theory of jurisprudence, by modifying, in some essential particulars, that of Austin; and whose views, on account of the reputation of the writer, are given at length in the note. (*c*) But this notion is altogether without foundation. The Roman doctrine of the *jus naturale*, or *jus gentium*, as will be seen, originated with Aristotle; and that in his mind it had no connection with the impossible hypothesis of a state of nature is sufficiently shown by his definition of man as being by nature a political animal, and by his conception of natural right, or as he called it, the *nomos koinos*, or common law, as being part of the law of the State. Which was also the view of the Roman lawyers; who, as the author him-

self states, regarded the *jus gentium*, or *jus naturale*, "as something belonging to the present, something entwined with existing institutions." And this also was the view of English lawyers prior to the advent of Bentham and Austin. And of the truth of the doctrine, which simply asserts that reason, justice, or right, is part of the law, no more striking proof can be given than is furnished by the observation of Sir Henry Maine himself, on the part it performed in the development of the Roman law, viz.: that "the progress of the Romans in legal improvement was astonishingly rapid, as soon as stimulus was applied to it by the theory of natural law," and that "he knew of no reason why the law of the Romans should be superior to that of the Hindus, unless the theory of natural law had given it a type of excellence different from the usual one" *

§ 48. *Statement of the Doctrine of Natural Right.*

The doctrine of natural right simply asserts that there are certain principles of justice existing independently of human institutions, by which the conduct of individuals towards each other, and also that of the State, ought to be regulated. But this is also in effect to assert the existence of natural rights; for the terms, a right, and justice, are strictly correlative; whatever a man may justly do, that he has a right to do; and hence the term rights, taken collectively with reference to an individual, denotes merely the sphere or province within which he may act freely without injustice. The relation of the two terms is therefore precisely expressed in the definition that justice consists in the observance of rights † And hence, to assert the existence of justice is but another mode of asserting the existence of natural rights.

Of the existence of justice, and consequently of natural rights, it is impossible to doubt. The conviction of their existence is so universal, so profoundly rooted in the belief and sentiments of mankind, and so evidently a constant attribute of human consciousness, that the argument in support of the proposition, except to those who expressly or in effect deny it, is hardly necessary; and as to those, a sufficient refutation of their views may be found in the logical defects of their own arguments, to which we have adverted.

To establish the doctrine of natural right affirmatively, the most efficacious argument consists in the simple enumeration of the many familiar rights recognized in every system of law, such as the right to personal liberty and security, or, as it may be more properly called, the right of self-ownership, the right of property, the right of husband in wife, and parent in child, and *vice versa*, and other rights of ownership; and rights of obligation, such as to the performance of contract, and compensation, or restitution, in cases of delict; all of which are simply natural rights recognized by the State. (*d*)

The rights above enumerated are universally recognized in all civilized

* *Ancient Law*, p. 75.

† *V. infra*, p. 299.

countries, and are in fact as susceptible of demonstration as the propositions of Euclid; but it will be sufficient for our present purpose to establish this, with reference to one of them only, viz., the right of self-ownership, or of personal liberty or security, from which all others are derived. This right is obviously essential, not merely to the welfare or happiness, but even to the existence of the individual, and is therefore to be admitted; nor can it be denied, without absurdity; for the question, in its ultimate analysis, may be reduced to this simple dilemma: Does a man belong to himself, or to somebody else? And, obviously, the first alternative must be accepted, unless the second can be established; and to establish the second, it is necessary affirmatively to show who is his master. If any one, he is a slave, and it will make but little difference to him whether his master be another individual, or the State, or rather, the individual or individuals who, for the time being, wield the political power of the State. (*e*)

Hence, as we have observed, it is a proposition universally accepted, that the principal end of the State is to cause justice to be observed; or, in the language of the Constitution of the United States, to "establish justice." Hence, as we have also observed, the difference between theoretical and positive right, or right as actually established under a given system of positive law, is merely the difference between the theory of rights and its attempted realization, a difference not essential, but accidental merely, and which is, in fact, much less considerable than is commonly supposed.*

This proposition, which, it will be perceived, is of fundamental importance, cannot, as we have observed, be denied, without denying, also, the existence of natural rights; and, accordingly, it is in fact not denied by the jurists of any school, except that of Austin, who at the same time denied the existence of rights, and of justice, otherwise than merely as creatures of the governmental will; but in this they are guilty of asserting, not merely a false proposition, but a logical absurdity; for these jurists, like others, have their theory of morality, viz., the principle of utility, and thereby assert the existence of moral distinctions, and consequently the existence of a distinction between the just and unjust, which are but species of right and wrong; for to assert that certain acts of men are just, and certain others unjust, is but to assert that within the sphere of action defined by the former class of acts, men ought to be permitted to act freely; or, in other words, that it is right that such liberty be accorded to them. But, as we have seen, this liberty, to which every man is justly entitled, is but another name for the aggregate of what are called his rights; and hence, to assert the existence of any principle of morality whatever, whether that of utility, or any other, is *ex vi termini* to assert the existence of rights; and to deny the latter is in effect to deny the existence of morality, including even the special form of morality asserted by them, the principle of general utility. Hence, as the jurists referred

*See opinion of Leibnitz, *infra*, p. 299.

to, though denying the existence of natural rights, do not, in general, differ from the rest of mankind in admitting the existence of moral distinctions, they are clearly guilty of logical inconsistency; and this, indeed, is the only plea upon which they can be acquitted of the graver charge of being, in theory, the enemies of Justice and of Morality.

§ 49. *Of the Relation Between Natural, or Theoretic, and Positive Right.*

Thus far, the doctrine is sufficiently plain, and is, in fact, generally admitted. Nor can there be any doubt that there is a necessary and essential connection between natural, or theoretic, and positive right; but the more difficult problem remains, to determine the precise nature of the relation between them. This problem, the complete solution of which is just now the great desideratum of jural science, is too extensive to be adequately treated here; but the general nature of the relation may be readily explained.

(1) This relation may be expressed by saying that the principles of natural right, so far as they are determinate, and are known to and recognized by the people generally, or, in other words, so far as they are expressed or manifested in the general conscience, or positive morality, of the people, constitute a part of the law; by which is meant, that they constitute, not merely the material out of which, or the norm after which, the law is fashioned, or made, as is the opinion of Austin and others, but an integral, or component part of the law, in the same sense, precisely, as do statutes and customs.

(2) With reference to public right, or the rights of the State, this is sufficiently obvious; for, with regard to the State, no other law can be conceived of as governing it, than natural right, or justice; and without this, as we have observed, it is impossible to show that the State has any rights, or that any one is under obligation to submit to its power. Nor is this proposition inconsistent with the acknowledged existence of unwritten constitutional law and of international law; for these are but terms, denoting the law of nature, or natural right, as applied to the internal, and the external jural relations of State; nor can any other definition be conceived of. They are either this, or they are not law; and unless the former, the latter proposition, which is the doctrine of the Austinian jurists, must be accepted. These jurists are, indeed, right in asserting that both constitutional and international law are merely positive morality; but this is merely to assert that positive morality, or, rather, that part of it that is called positive right, is, in effect, law.

It may, indeed, be said, and the proposition cannot be disputed, that both laws are based largely upon custom, or, as it is called, with reference to the latter, the usage of nations. (*f*) But, as we have seen, custom does not, of itself, constitute law: it is law only to the extent that reason, or natural right, determines it to be so; for it is a received principle of jurisprudence, that the unreasonable customs carry with them no obligation.

So, also, with reference to contract, or convention, of which it is said international law largely consists, these are binding only because it is a principle of natural right that they should, in certain cases, be observed. Hence, contracts, like customs, are mere elements in the problem of international or constitutional right, and ultimately depend for their validity upon the principles of natural right, or justice.

Especially are these observations true with reference to the theory of the State, the subject of our present investigations; for here, obviously, we have to deal exclusively with theoretical right, unembarrassed by the consideration of contracts, customs, laws, or other historical facts, except in the abstract, as elements of the problem.

(3) But, with reference to private right, the question is more complicated; for here we have to take into consideration, not only customs, but also judicial decisions and statutes, or legislative acts; and these present questions of great difficulty, which cannot here be considered at length.

It will be sufficient, however, for our purposes, to say, with reference to judicial decisions, or precedents, that they are but a species of custom, and rest for their binding force, upon the same principle; and, with reference to statutes, or legislative acts, that they are but the acts of men, and, like contracts, or other human acts, derive their authority solely from the right of the men enacting them to dispose of the subject matter to which they relate: if within the right of the legislator, they are valid, and otherwise not. Hence, statutes and judicial precedents, like the acts of private individuals and customs, are mere elements in the problem of private right, and ultimately depend for their validity upon the principles of natural right, and can have no other foundation, and hence, to assert their validity is, in effect, to assert the existence of natural right. Hobbes is therefore right in asserting not only that "the law of nature is a part of the civil law of all the commonwealths of the world," but that "reciprocally, also, the civil law is a part of the dictates of nature; for, as he says, justice, that is, performance of covenant, and giving to every man his own, is a dictate of nature, and every subject in a commonwealth hath covenanted to obey the civil law." Hence he says, "The civil and natural laws are therefore not different kinds, but different parts of law; whereof, one part being written, is called civil, the other, unwritten, natural." *

Of the truth of our proposition, that natural law is part of every system of positive law, or, in the words of Hobbes, that it is a part of the civil law of all commonwealths of the world, there cannot therefore be any doubt, and the chief difficulty of men in conceiving it is in the failure to observe that what we call the law consists of several essentially different parts. These consist of the criminal and the civil law, and the latter of the law of civil procedure, and the law of private right; and the last, again, of the doctrine of rights, or, as we may call it, right, and of the

* *Lev.*, 124.

doctrine of actions, or remedies for the enforcement of rights. Right, or the doctrine of rights, as we have defined it, constitutes the substantive part of the law, for which all the other parts exist; which accords with the division of the law by Bentham into substantive and adjective law. Our proposition is to be understood, therefore, as asserting simply the identity of the substantive law, or the doctrine of rights, with natural right: and the correctness of our reasoning may be very readily verified by comparing the different systems of law prevailing in modern Europe; in all of which the substantive part of the law, or the doctrine of rights, will be found to be substantially identical: so that a man may travel throughout all the countries of the civilized world, without finding his rights substantially varied. Everywhere, his rights to personal liberty and security, to his property, to the payment of debts due him, and the performance of other contracts, and to compensation, or restitution in case of delict; and, in short, his rights generally, as enjoyed by him at home, will be recognized.

(4) This view of the nature of the private right is, in fact, verified by the early history and the subsequent development of every system of law. In all countries, positive law commences merely with the establishment of a jurisdiction, or power to declare justice, or right, (in the words of Magna Charta, *justitiam vel rectum*) in controversies presented for decision; and the law of private right consists merely of the principles of justice, or natural right, which, of course, includes the observance of existing customs. Afterwards, the law is modified by new customs, and especially by the custom of the courts, or judicial precedents; but it is only at a later period, and until modern times very sparingly, that the law of private right is materially affected by legislation. In the beginning, as justly observed by Sir Henry Maine, legislation is an unknown phenomenon. "It is curious," he says, in a passage already partly quoted, "that the further we penetrate into the primitive history of thought, the further we find ourselves from a conception of the law which at all resembles a compound of the elements which Bentham determined. It is certain, that, in the infancy of mankind, no sort of legislature, nor even a distinct author of law, is contemplated, or even conceived of;" and he adds, "Zeus, or the human king on earth, is not a law maker, but a judge." *

From this beginning, it is a well-known historical fact, that both in our own and in the Roman system, the law has been developed mainly by the decisions of the courts, and is therefore an expression, not of the will, but of the judgment, or conscience, of the State. In this development, legislation, until recently, has had but little part; and it is to be regarded, not as an essential or necessary element in the law, but merely as a means of modifying its natural development.

The truth of the theory of the Historical School of jurists—as applied to positive jurisprudence—must therefore be admitted by all who are

* *Ancient Law*, chap. i.

familiar with the law; and those who are not thus familiar may readily satisfy themselves of the proposition by referring to the list of rights that we have given above. These, as we have observed, are not only susceptible of demonstration but are universally received in all civilized countries, and the principles by which they are determined are in fact recognized everywhere as part of the positive law. So that to this extent, in the modern European world, the dream of Cicero is fully realized: *"Non erit alia lex Romæ, alia Athenis; alia nunc alia posthac, sed et apud omnes gentes, et omnia tempora una eademque lex obtinebit."* And in this general recognition of natural rights is to be found the essential characteristic of our advanced civilization. Nor is it extravagant to say that this is a law written by the finger of God, or, for those who prefer the expression, by the finger of nature, upon the heart of man—not meaning thereby that it is written upon the heart of each man so as to be discerned without reasoning, but that it is the nature and constitution of man in the progress of civilization to recognize and understand it.

(5) Our proposition, it will be observed, asserts that natural right constitutes an *integral* part of the actual law of every country. Those, therefore, who regard it merely as the material out of which, or the *norm* after which, the law ought to be fashioned, in effect deny the proposition, and also, in effect, deny the existence of natural right, which, from its essential nature, must be regarded as asserting its own paramount obligations over government as well as over individuals. But to this class belong many of the theoretical or philosophical, as distinguished from the historical jurists, of modern Europe. These accept the doctrine of natural right without reservation, but, owing to their want of familiarity with the positive law, or to other causes, do not seem fully to have grasped its significance. The true expression of the doctrine, I repeat, is that justice, or natural right, so far as its principles are determinate, constitutes in every commonwealth, not merely an ideal to be attained by legislation, but an integral or component part of the actual or positive law of the land, as binding on the courts and the State generally, as any other part of the law, and that its violation by either is not only unjust but unlawful; and that this is to be understood not merely as a philosophical theory but as a received principle of every system of positive law. But the writers referred to, while, in some respects, expounding admirably the principles of natural right, and showing by actual demonstration their clear and definite character, seem to assume that they are not in fact law, and can become law only by some sort of legislative transmutation.

Thus Kant—in his celebrated definition of the several powers of the State, namely, the *legislative*, the *executive*, and the *judiciary* powers, which we have already quoted—in effect asserts that the law is altogether the expression of the will of the legislative power. And so Bluntschli, referring to the theory that the State should be merely a

legal State (*rechts-stat*), *i. e.*, that its functions should be confined merely to the administration of justice, says that in such case "the State would at last become a mere institution for administering justice, *in which the legislative power would establish the legal rules*, and the judicial power would protect them and apply them to particular cases;" which is in effect but a different expression of the proposition asserted by Kant. And the same prejudice seems to be entertained by many other writers. (*g*)

But obviously in this they are inconsistent, for nothing can be clearer than the two propositions—one of principle, the other of fact; first, that if there are any principles of natural right sufficiently definite and sufficiently known to be observed, it is right that they should be observed; and secondly, that in fact they are substantially observed in all systems. The true test or criterion of the *jural* or legal nature of such principles, therefore, is not the will of the legislator, but general recognition by the people; when they are thus recognized they become, *ipso facto*, part of the law. Hence it is a principle universally received by jurists that custom is part of the law, and that in fact the law consists mainly of customs.

(6) This is the doctrine of the so-called historical school of jurists, of whom the most distinguished representatives are Hugo and Savigny, and which, indeed, is but a formulation of the views of practical jurists generally. According to this doctrine, as expressed by Mr. Ahrens, "the source of right (that is, positive right, or the law) is placed, not in the individual reason, but in the national conscience, as successively existing in history." * And this is unquestionably the true doctrine. For to be observed as a common rule obligatory upon all, the principles of right must be generally recognized, and hence such general recognition constitutes the test or criterion by which the principles of positive right are to be distinguished. The proposition, however, it will be observed, does not assert that the general recognition of a given principle as a principle of natural right necessarily makes it such. The general consensus of the moral convictions of men derives its authority partly from the necessity of observing custom, but chiefly from the presumption it gives rise to, that it is in fact right. But it is, within certain limits, competent for the legislature to entertain the question whether the principle asserted be true, and if not, to correct it. And this in general equally belongs to the function of the judge—the only restriction upon him being that he is bound to decide, not according to the exigencies of the particular case, but according to the effect of the rule. And this accords with the principle explained in a former chapter, that the interference of the State should not be extended to cases where the desired end may be effected by the spontaneous action of natural social forces.

(7) Hence, to sum up the argument, if it be true, as we have sufficiently

* *Cours de Droit Naturel*, p. 22.

established, that in every society or State a body of principles governing the jural relations of men, or, in other words, a system of private right, is naturally and spontaneously developed, and that these principles are, in the main, rational and just, and are generally recognized, not only by the particular people, but by all peoples of the same grade of civilization, and to a considerable extent by all peoples, civilized and uncivilized, and that such principles are universally regarded by the people as the criterion by which their just rights are to be determined, and if it be further true that no government is strong enough to disregard, except to a limited extent, these jural convictions of the people, or to violate the rights believed by the people to be guaranteed by them, and that in fact all governments hold their power, and even their existence subject to the condition of substantially observing them, then it must inevitably follow, first, as a historical fact, that these principles, so far as they are thus recognized, must be and in fact are, in theory recognized and in practice substantially observed by all States, and hence constitute an integral part of the law; and secondly, that this is not an accidental but a necessary fact or phenomenon resulting from permanent laws of human nature, to which philosophy must conform itself.

I have dwelt largely on this point because, though the proposition contended for is obvious and simple, there seems to be an inveterate prejudice to the contrary, from which even those who have convinced themselves over and over again of its falsity can hardly escape. Hence, whenever I assert the doctrine in explicit terms, I am conscious that, to many readers, it will appear paradoxical; and I have, therefore, being convinced that herein must consist the first step in the intelligent study of political science, labored with anxious care both here and elsewhere throughout the work, and at the risk of tediousness, to establish the true doctrine of natural right, both directly by demonstrating its abstract truth, and by showing it to have been substantially realized in every system of law, and indirectly by demonstrating the absurdity of every conceivable contradictory theory. For, as in the past, the noble development of jurisprudence as exemplified in the Roman and in the English law was due entirely to the acceptance and application of this doctrine, so the present state of stagnation into which it has fallen is to be attributed to its neglect; nor in my opinion is there any hope of a revival either of jurisprudence or political science generally, until the doctrine of natural right, as above explained, is again received and assigned to its proper place.

§ 50. *Historical View of the Doctrine of Natural Right.*

The theory of natural right, and its existence as an integral part of the law, has been uniformly recognized by the jurists of all ages and countries, with the exception of Austin and the modern English jurists.

(1) It is clearly and forcibly expressed by Aristotle, who may be

called the first and one of the greatest of jurists. In his view (as we have seen) man is by nature a political animal, and hence his natural state is in society. Hence *political* justice—by which term he denoted the justice obtaining between the citizens of the State, and which he defined as consisting in conformity to the law (or *nomos*) of the State—is, in fact, the only justice. "For," he says, "the term justice implies the case of those who have laws (*nomoi*) to which they are subject,"* and hence justice can exist only "in the case of those between whom laws exist," or, in other words, between men in society. In his view, therefore, the terms, justice and the law (*nomos*), connote the same essential idea, and differ only in this, that the one denotes the rule, and the other, conformity to the rule; as is in effect asserted in his proposition that "the administration of law is the determination of *the just and the unjust,*"† or, in other words, the administration of *justice.* Having thus identified political justice with the justice actually existing in and enforced by the State, or, in other words, the law, he proceeds to say that it is partly *natural* and partly *legal.* To use his own language, "Of the political just, one part is natural, and the other, legal. The natural is that which everywhere is equally valid and depends not upon being, or not being received, but the legal is that which was originally a matter of indifference, but which, when enacted, is so no longer; as the price of a ransom being fixed at a *mina,* or the sacrificing a goat and not two sheep, and further, all particular acts of legislation as the sacrificing to Brasidas, and all those matters which are the subjects of decrees."‡

And in the *Rhetoric* a precisely corresponding division is made of the law. "Let the acting unjustly," he says, "be defined as the voluntary commission of hurt in contravention of law. Now law is either *common* or peculiar, *nomos koinos* or *nomos idios.*" The peculiar law I call that by whose written enactments men direct their policy; the common law, whatever unwritten rules appear to be recognized among all men.§

And in another place the same idea is thus more fully expressed: "Law, now I understand, to be either *peculiar* or *common* (*idios* or *koinos*); the peculiar to be that which has been marked out by each people in reference to itself, and this is partly written and partly unwritten. (*h*) The common law I call that which is conformable merely to the dictates of nature. For there does exist naturally a universal sense of right and wrong, which, in a certain degree, is intuitively divined, even should no intercourse with each other, nor any compact have existed; which sentiment the Antigone of Sophocles enters uttering that it was just, namely, to bury Polynices, though forbidden, since by nature, this was a deed of justice; for, by no means, is it for this or the next day merely that this maxim is in force, but forever; nor is there any one that knows from whom it proceeded. And as Empedocles says on the subject of not slay-

* *Ethics*, Bk. v, Chap. vi, fol. 4.

† *Id.*, Bk. v, Chap. vi, fol. 4.

‡ *Id.*, Bk. v, Chap. vii, fol. 1.

§ *Rhetoric*, Bk. i, Chap. x, fols. 2, 3.

ing that which has life; for this is a maxim not right here nor wrong there, but a principle of law to all." (*i*)

(2) The distinction made by Aristotle between the common and the peculiar law (*nomos koinos* and *nomos idios*), was adopted without change by the Roman jurists; who regarded the law as consisting of two parts, namely, the *jus gentium* or *naturale* and the *jus civile*. "Every people," they say, "uses partly its own peculiar law (*jus*) and partly the law common to all men. For that law which each people has established for itself is peculiar to it, and is called the *jus civile* as being peculiar to the State in question; but that which natural reason has established among men, is observed generally among all people and is called the *jus gentium* as being the law which all nations use." *

The same notion is also embodied in their definitions as given in the works cited in note. (*j*)

(3) It was to this conception of *jus* that the Roman law owed the rational character of its development; which, in fact, commenced with, and was, in a large measure, due to the adoption of the Greek philosophy by the Roman lawyers. Hence, the Roman law is, to a great extent, to be regarded, as Celsus says of it, as "a true philosophy," or, in other words, a "body of reasoned truth," which is the view taken of it by Leibnitz; who was at once philosopher and jurist; and whose opinion is therefore entitled to the highest consideration. (*k*)

(4) The doctrine of natural right, and of its existence as part of the law, was received by the different countries of Western Europe along with the whole body of the Roman law, and, so far as my knowledge extends, has never been disputed by the continental jurists. It was also adopted by the jurists of the common law, and until the advent of Bentham and Austin, was universally received.

(5) On this point the only difficulty arises from the exuberance of the authorities. Bracton quotes literally the passages I have cited from the Roman jurists, adding much to the same effect of his own.

"Jurisprudence," he says, "differs much, therefore, from justice; for jurisprudence recognizes, and justice gives what is due to every one. Justice, therefore, is the virtue, jurisprudence the science; justice the end, jurisprudence the means." †

The doctrine of natural right as part of the law is also explained at great length by Fortescue, *De Laudibus Legum Angliæ*,‡ also by St. Germain,§ and Fleta, and finally by the great master of the common law, Coke; who asserts explicitly that "the law of nature is part of the law of England;" and, defines it, in the words of "Aristotle, *Nature's Secretary*, as that *quod apud omnes homines eanden habit potentiam*"; and "herewith agreeth," he says, Bracton, Lib. i, Chap. v, and *Dr. and Student*, Chaps. v, vi, "And this appeareth plainly and plentifully in our books."‖ And to the same effect are numerous other passages hereafter cited.

* *Pandects and Inst. of Justinian.*

† Bk. i, Chap. iv, § 1–4.

‡ Chap. i, 15, 16.

§ *Doctor and Student, passim.*

‖ *Calvin's Case*, 7 Rep., 12, 13.

In this way only can be explained the notorious fact that, in spite of the avowed hostility of the English people to the Roman law, the English lawyers, from the time of Glanville to the present day, have freely borrowed from its principles. (*l*)

The same process took place on the continent, and resulted in the establishment of the Roman law as the common law of Europe—a fact, it would seem, more calculated to surprise than its partial adoption in England. In the latter country, the process was, at a period subsequent to the time of Bracton,* checked by the hostility of the English people to the Roman law; but the only result was, that the process was transferred from the common-law courts to the court of chancery, where it went on unchecked. In modern and more enlightened times the common-law judges again commenced to borrow freely from the civilians. It is related of one of the greatest of our jurists, Sir Matthew Hale, that "he applied himself with great avidity to the contemplation of the Roman law;" and that "he often affirmed that the principles of jurisprudence were so well delivered in the *Digests* that law could not be understood as a science without first resorting to them for information."† (*m*)

Nor, as we have observed, can any one, even slightly familiar with the two systems, fail to perceive the entire identity of principle and method of those portions of the two systems that deal with the determination of rights, and the substantial identity of rights themselves as realized in all civilized nations.

(6) Two distinctions, however, are to be drawn between the English and the continental jurists. The Roman law was inherited by the latter from a corrupt and degenerate age, after its spirit had fled, and the rational method, by which it had been developed, had ceased to operate; and its general reception on the continent, in its complete form, as part of the positive law, has given to it an undue authority. Hence, the genius of the continental jurists seems, to a certain extent, to have been cramped or fettered by the authority of Justinian's collections, in the same manner as, in other branches of philosophy, thought has been dominated by the authority of the Church; and, accordingly, it has been well remarked that "the fruits to be obtained from the study of the Roman law can be reaped to their full extent only in countries where it is not allowed the force of law,"‡ as is the case in England.

On the other hand, jurisprudence has been cultivated in England, in the main, only by professional lawyers, for purposes of the practical administration of justice; while on the continent, it has fallen into the hands of jurists, devoted exclusively to its theoretical study, or of philosophers; and hence, has resulted a (to us) humiliating superiority in the exposition of the law, and of the philosophy of the law, on the continent. Still, admitting this superiority, it may be said of continental jurisprudence, that

* *Calvin's Case*, 346.

† Hale's *History of the Common Law*, iii.

‡ Kaufman's *Mackeldey*, Translator's Preface, 7.

it has been cultivated of late years too exclusively either by professional jurists or by philosophers unfamiliar with the details of the law, and hence, the following strictures of Bacon may be applied to them as well as to ourselves.

"All who have written concerning laws have written either as philosophers or lawyers. The philosophers lay down many principles fair in argument, but not applicable to use; the lawyers being subject and addicted to the positive rules, either of the laws of their own country, or else of the Roman or pontifical law, have no freedom of opinion, but, as it were, walk in fetters."* Pantagruel expresses the same opinion of the French lawyers, in somewhat more forcible language: "Seeing," he says, "that the law is excerpted from the very bowels of moral and natural philosophy, how should these people know the law? who, by . . . . , have read no more in philosophy than my ass."

NOTES.

(*a*) Thus, Bentham regarded the expressions, the law of nature and natural rights, as purely metaphorical. "The primitive sense of the word law," he says, "under ordinary meaning of the word, is the will, or command of the legislator." "The law of nature is a figurative expression, in which nature is represented as a being, and such and such a disposition is attributed to her, which is affirmatively called a law. Natural rights are the creatures of natural law. They are a metaphor which derive their existence from another metaphor." And he adds: "In this anti-legal sense, the word right is the greatest enemy of reason, and the most terrible destroyer of governments. There is no reasoning with fanatics, armed with natural rights" (*Principles of Legislation*).

Austin, also, while admitting the possibility of a natural law, enacted by the Creator, in effect denies that it could be known to us, except through the commands of the government; and thus practically arrives at the same conclusion.

(*b*) Hence, as observed by St. Germain, *Doctor and Student*, pp. 11 and 12, "it is not used, among them that be learned in the laws of England, to reason what thing is commanded or prohibited by the law of nature, and what not; but . . . . when anything is grounded upon the law of nature, they say reason will that such a thing be done; and if it be prohibited by the law of nature, they say that it is against nature, or that nature will not suffer it to be done." And the same view is asserted by Coke, in his celebrated saying, that "*Nihil quod est contra rationem est licitum*," and that "the common law itself is nothing else but reason" (*Co. Litt.*, 976); and by Mansfield, more accurately, in the definition that it is nothing else but reason modified by habit and authority; and by Burke, in saying that it is "the collected reason of ages, containing the principles of original justice with the infinite variety of human affairs."

(*c*) "After nature had become a household word in the mouths of the Romans, the belief gradually prevailed, among the Roman lawyers, that the old *jus gentium* was, in fact, the lost code of nature . . . . by which nature had governed man in the primitive state." "Roman jurisconsults, in order to account for the improvement of their jurisprudence by the prætor, borrowed from Greece the doctrine of a natural-state man—a natural society, anterior to the organization of commonwealths, governed by positive law." And, again: "The law of nature confused the past and the present; logically, it implied a state of nature which had once been regulated by natural law. Yet the juris-

* Bacon's *De Aug.*, 8, 3.

consults do not speak clearly or confidently of the existence of such a state, which, indeed, is little noticed by the ancients, except where it finds a poetical expression in the fancy of a golden age. Natural law, for all practical purposes, was something belonging to the present—something entwined with existing institutions, something which could be distinguished from them by a competent observer. The test which separated the ordinances of nature from the gross ingredients with which they were mingled, was a sense of simplicity and harmony; yet it was not on account of their simplicity and harmony that these finer elements were primarily respected, but on the score of their descent from the aboriginal reign of nature. This confusion has not been successfully explained away by the modern disciples of the jurisconsults; and, in truth, modern speculations on the law of nature betray much more indistinctness of perception, and are vitiated by much more hopeless ambiguity of language, than the Roman lawyers can be justly charged with" (*Ancient Law*).

(*d*) Rights, as we have explained, are of two kinds, viz., rights of ownership and rights of obligation, and the enumeration given in the text is therefore exhaustive.

(*e*) It is said by Kant, that this right "is the one, sole, original inborn right belonging to every man in virtue of his humanity" (*Phil. of Law*, p. 56); but, in fact, from this right are derived all others. This is admirably shown, though with some error, by Herbert Spencer, in his *Social Statics* and *Justice*, and is also treated in detail in Mr. Smith's *Right and Law*, Chaps. vii and viii.

(*f*) Accordingly, the most approved definition of the Common Law, uniformly asserted by English jurists from the time of Bracton, is that it consists of the general customs of the realm or State (1 *Blacks. Com.*, 63). "In England," says Bracton (Bk. i, Chap. i, § 2), "the law (*jus*) has come without written enactment (*ex non scripta*), because use has established it." In this sense, the term, Common Law, is opposed, by modern legal writers, to statutory law. "Common Law is taken for the law of this kingdom simply . . . . as it was generally holden before any statute was enacted in Parliament to alter the same" (Jacobs' *Leg. Dict.*). "The Common Law is that which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law" (Bouvier, *Law Dict.*).

(*g*) Thus Mr. Whewell (*Elements of Morality*) in his otherwise admirable chapter on "Justice" seems to assume this: "Though, in general," he says (Sect. 489), "Justice is determined by law, the law must be framed in accordance with justice. Justice is directly and positively determined by law; for a man's just rights are those which the law gives him. The law must be framed in accordance with justice, and must therefore reject all that is arbitrary and unequal, as soon as it is seen to be so." The defect of Mr. Whewell's views is, he fails to grasp the true nature of the relation between natural right and law; which is that the former is part of the latter.

(*h*) There will be noted a discrepancy between this proposition and the one immediately preceding; in the one the *written law* is described as commensurate with the *nomos idios*, and the *unwritten*, with the *nomos komos*, or common law; in the other, the *nomos komos* is said to be partly *written* and partly *unwritten*. The latter is the true view and conforms to the distinction made in the Roman law, and in our own between the *lex scripta* and the *lex non-scripta*, and also to the distinction made in our law between the common and the statute law.

(*i*) See further on this point *Elements of Civil Law*, in the chapter on "The Law of Nature," by Dr. Taylor; who, after quoting the language of Aristotle, says: "These are the very words of the emperor: *Omnes populi qui legibus et moribus reguntur partim suo proprio partim communi omnium hominum jure utuntur.*" "This twofold division of the law," he adds, "as it is the earliest, so it is perhaps the best and has been generally received by lawyers and philosophers."

Sir Frederick Pollock very strangely mistakes the position of Aristotle upon this

point: "Aristotle," he says, "struck out a new and altogether different part. *In the first place he made the capital advance of separating ethics from politics.* Not only is this not done in the Platonic writings, but the very opposite course is taken in the Republic. Man is represented as *a micropolis*, and the city is the citizen *writ large*" (*History of the Science of Politics*, p. 7).

The views of Aristotle as expressed in the above quotations, are directly to the contrary; and it may be added that the Platonic view of the subject objected to by him has also been very generally received by modern European publicists (*v.* Ahrens, cited *supra*), (*Id.*, Bk. i, Chap. xiii, Fol. 2).

(*j*) *Justitia* (*i. e.*, the virtue) *est constans et perpetua voluntas jus suum cuique tribuendi.* Hence, abstract, or, as it is called by Aristotle, political justice, consists in rendering to every man his right (*jus suum cuique tribuendo*).

Jurisprudentia est . . . . justi atque injusti scientia. "*Jus*," says Celsus, "is the art of the good and the equal—*ars boni et æqui;* of which some one deservedly calls us the priests; for we administer the cult of justice, and profess the knowledge of the good and the equal, separating the equal from the unequal and distinguishing the right from the wrong . . . . *following, unless I am deceived, a true, and not a pretended* philosophy. The precepts of *jus* are to live decently, to hurt no one, and to give every man his own" (*honeste vivere alterum non lædere suum cuique tribuere*).

"*Jus civile* is that which neither recedes altogether from the *jus naturale*, or *jus gentium*, nor altogether follows it. Therefore when we add anything to, or detract anything from the common law (*jus communis*), we make a peculiar law, *jus proprium*, or *jus civile.*" And it is added: "Almost all contracts were introduced from the *jus gentium;* as for instance, buying, selling, letting, hiring, partnership, deposit, loan and other unnumerable.

"This law of ours is partly written, partly unwritten; as with the Greeks the laws (*nomoi*) were written or unwritten.

"The written law (*jus scriptum*) consists of the several kinds of statutes (*leges, plebiscita, senatus consulta, principum placita*), of the edicts of the magistrates or judges, and the opinions of the learned in the law (*responsa prudentum*).

"The unwritten law is that which custom has approved.

"The principles of natural right (*naturalia jura*) which are observed equally among all peoples, being established by a certain divine providence, remain always firm and immutable, but those which each State has established for itself are often changed, either by the tacit consent of the people or by some later law."

Compare *Coke*, Calvin's Case, Rep. 25.

"*Leges naturæ perfectissimæ sunt et immutabiles; humani vero juris conditio semper in infinitum currit, et nihil est in eo quod perpetuo stare possit; leges humanæ nascuntur, vivunt, et moriuntur.*"

(*k*) "I have often said, that, after the writings of the geometricians, there exists nothing which, in point of strength, subtilty and depth, can be compared to the works of the Roman lawyers; and, as it would be scarcely possible from intrinsic evidence to distinguish a demonstration of Euclid's from one of Archimedes or Apollonius (the style of each of them appearing no less uniform than if reason herself were speaking through her organs), so also the Roman lawyers all resemble each other, like twin brothers; insomuch, from the style alone of any particular opinion or argument, hardly any conjecture could be formed about its author; nor are the traces of a refined and deeply meditated system of natural jurisprudence anywhere to be found more visible or in greater abundance. And even in those cases where its principles are departed from, in compliance with language consecrated by technical forms, or in consequence of new statutes or of ancient traditions, the conclusions which the assumed hypothesis renders it necessary to incorporate with the eternal dictates of right reason are deduced with a soundness of logic and with an ingenuity that excites admiration. Nor are these deviations from the law of nature so frequent as is commonly supposed."

This passage is quoted by Dugald Stewart (*Philosophy of the Human Mind*, ii, iii, 3); who, while admitting Leibnitz to be good authority, finds it difficult to accept his opinion.

(*l*) The most striking illustration of this fact is furnished by the treatise of Bracton, with reference to which Sir Henry Maine makes the following observation: "That an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the *corpus juris*, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence" (Maine's *Ancient Law*, Chap. iv). It must, indeed, be hopeless to reconcile this fact with Mr. Maine's, or rather, Austin's and Bentham's theory of the law; but, in the light of the true theory, there is nothing in it to surprise us. It was the function of the judges to administer justice, and their duty, at least, in the then condition of the law, to seek the principles of justice where they could best find them, namely, in the Roman law. "What is good sense in one age must be good sense, all circumstances remaining, in another, and pure, unsophisticated reason is the same in Italy and in England, in the mind of a Papinian and of a Blackstone" (Sir William Jones' *Bailments*, Introduction).

"To have neglected to take advantage of the assistance which was then offered would have argued a high degree of presumption, or gross and culpable ignorance; neither of which is to be imputed to the founders of our system of jurisprudence" (1 Spence's *Eq. Jur.*, 123).

(*m*) For a fuller account of the influence of the Roman upon the English law, see observations of Spence, 1 *Eq. Jur.*, pp. 108, 109, 122-124, 131, 132, 224, 234, 235, 285, 286, 346, 347. Mr. Markby, in his late work, *Elements of Law*, takes a different view, but in this he is clearly wrong.

CHAPTER VI.

Of the Rights, or Just Powers of the State.

§ 51. *Of the State as a Body Politic or Corporation.*

The rights of the State have already been incidentally but extensively discussed, in the progress of our work, so that but little remains except to summarize what has already been said.

The notion of a right or of an obligation implies some person or persons, in whom it exists. Hence, public rights, or rights of the State, are in fact rights of the individuals who compose it, differing from individual rights only in being common to all; and the same is true in Private Right of all rights vested in classes of individuals, regarded as aggregates (*universitates*), as, for instance, in the case of an ordinary business corporation; which exists merely for the benefit of the stockholders, and is merely an instrument or organ for exercising more efficiently their individual activities; and whose rights, obviously, are merely their rights. But for purposes of expression, this view of rights and obligations as vested in actual persons, though true, is, with reference to rights vested in classes of individuals, an extremely inconvenient one, and on this and on other accounts, it has become necessary to invent what are called collective names, such for instance, as a flock of sheep, a library, a regiment, etc., by which all the individuals included under the name are, figuratively speaking, unified, or regarded as one. This one, or unit, is generally conceived to be a thing, as in the instances above given, and this, for ordinary purposes, is sufficient; but when we have to express the moral relations of men—their rights and obligations, their duties, their virtues, or other moral qualities—it becomes necessary to conceive of it as a person—for it is in persons only that moral qualities can reside.

Hence, in the Law, it has become necessary, for the purpose of dealing more conveniently with rights and obligations, to invent the notion of a *juridical* (*a*) person, or, as it is more commonly called with us, a body politic or corporation; which is a fictitious or imaginary person, said to be created by fiction of law.

Of corporations the most perfect type is a State. For that exists naturally, as an inevitable consequence of human nature, and therefore presents an instance of a permanent organization analogous in many particulars to the actual human being. But nevertheless it is of the utmost importance that it always be borne in mind that its personality is merely fictitious, or imaginary, and that when we speak of its rights and obligations, it is a mere convenient expression for those of its citizens.

From the neglect to observe this obvious truth, many errors have resulted, and indeed it would be almost impossible to instance all the false and pernicious conclusions which have been drawn from this analogy—as, for instance, that of Kant, Rousseau, and numerous others, to which we have alluded, that the State has a will which must be regarded as the united will of the individual members of the community; which involves a double fiction, namely, the obviously false proposition that the wills of all the citizens may be, in fact, united, or, rather, chemically compounded, and the further proposition, that they are vested in a personage as purely fictitious as the genii of the *Arabian Nights*. And a still more remarkable instance is the *organic* or *psychological* theory of Bluntschli—already reviewed in the preceding pages of this work—which, in effect, regards the State as an actual *organism*, or organic being, having will, intelligence and parts like the actual man; and in which numerous functions are assigned to the State; many of which are illegitimate and some impossible.

On this account, in adopting the use of the term, "the *organic* theory,"* I spoke of it as not altogether appropriate. For, while the terms "organize" and "organization" are commonly applied to bodies of men, as when we speak of organizing a meeting, or a government, the term "organic" has acquired a narrower meaning as denoting merely an organic being, either animal or vegetable—a sense which it is necessary altogether to repudiate in speaking of the State. It will, therefore, be understood throughout this work that in applying the term, *organic*, to the State, we use it not as denoting an animal, or vital connection between its different parts, or as implying that the State is in any sense a living man, with intelligence, or will, but simply as denoting a permanent composite naturally existing whole, which, in many respects, bears a close analogy to an organic being in the narrower and stricter sense.

§ 52. *Of the Distinction Between the Internal and External Rights of the State; and Herein of International Right.*

In considering the rights of the State it is to be first observed that the State occupies two distinct relations, viz., the one, towards its subjects, the other, towards other States. Accordingly, the rights of the State are to be divided into two classes, namely, its *internal* and its *external* rights. The former belong peculiarly to the subject of the present work; the latter, to an independent, though closely related science, known as the Law, or, more properly, the *Right of Nations* (*jus gentium*), or, as in modern times, it is more commonly called, International Right, or Law.

It is one of Austin's tenets, generally received by the later English jurists, that international law, or right, is not law in the true sense, and this conclusion—as we have observed—necessarily follows from his definition of the law, as being merely the expressed will of the State; on which, as we have seen, his theory wholly rests. And hence, according

* *Supra*, p. 240.

to this view, International Law or Right is nothing more than positive morality. The last proposition is, indeed, undoubtedly true; but it is equally clear, as we have seen, that his definition of the law is untenable, and that his conclusion that International Law, or Right, is not law in the true sense, cannot be sustained. On the contrary, it constitutes a system of law, or right, essentially similar in its nature, and in its general principles and method to the Law of Private Right, or rather to that portion of the Law of Private Right which consists of the doctrine of *rights*, as distinguished from the doctrine of *actions;* which, as we have seen, consists merely of the principles of justice or natural right—including, of course, such arbitrary and accidental principles as are admitted by those principles. Hence, it must be said that not only International Right, but Private Right also, are, in fact, only positive morality; for they both consist merely of the principles of natural justice as received in the general conscience, and these constitute but a branch or division of positive morality.

International Law, therefore, may be described as being merely an application of the principles of justice or natural right to the relations existing between different States, regarded as juridical persons; nor is any other conception of it possible. The theory that conceives it to be based upon *custom*, and also that which conceives it to be based on *convention*, and, in fine, all other theories, are necessarily included in this. For each of these theories rests upon the assumption that justice, or right, demands the observance of the principle asserted, *i. e.*, the observance of *custom*, or of *convention*—and hence, as in the case of private law, the practice of nations, and treaties, and other contracts are merely elements in the problem; which, in every controversy, is simply to determine, in view of these, and all other circumstances, what are the mutual rights and obligations of the parties.

The doctrine of private rights, as observed in each State, and the doctrine of international rights, are, therefore, essentially the same; and this was well and clearly conceived by the Roman lawyers in their conception of the *jus gentium* or *jus naturale*, and by Aristotle in his conception of the *nomos koinos*, or common law, as including all those principles of natural right, or justice, observed by men generally. But in both cases, as we have observed, with regard to Private Right, the principles of justice or natural right can become the practical standard only when generally received. (*b*)

§ 53. *Of Private International Right.*

Hence, the system of rules and principles known as private international law, and sometimes treated under the title, "The Conflict of Laws," is improperly so called. This system may be described as including the rules and principles which govern the transactions taking place outside of the State, but presented to the courts of the State for determination. Controversies with reference to such transactions are

determined either by the law of the foreign State in which the transaction occurred, so far as consonant with natural right, and with the policy of the State exercising the jurisdiction, or by principles of natural right. The principal application of this jurisdiction is to the case of contracts; which are said to be governed by the law of the place of contract (*lex loci contractus*), and to cases of succession; but it is also applied to cases of trespass, and other torts. In all such cases the foreign law is applied, not on the supposed ground of comity, but because justice demands that it should be.

With these few and simple considerations, which have in England and in this country been greatly obscured by the prevailing theory, and which are sufficient to give a clear and definite notion of the nature of International Law, or Right, we will now revert to our proper subject; which is the internal rights of the State. (*c*)

§ 54. *Of the Distinction Between the Political and the Non-Political Rights of the State, and Herein First of the Social Rights of the State.*

The rights of the State may be divided into two general classes—namely, those which pertain to the individuals composing the State, and which differ from private rights only in being common to all, and those which pertain to the State in its corporate capacity only. The latter may be called the *political*, the former the *non-political*, or *merely social* rights of the State.

The former class includes the right to the maintenance of the public peace and security, and also to the preservation of the public morality. For the existence of these rights is essential to the existence and well-being of every individual in the community, and they therefore exist in the State because they exist in each of the individuals composing it. This is sufficiently clear with reference to the maintenance of the public peace and security, and with reference to the observance of justice; for without these, social life would be impossible; and it is equally clear that a decent observance of the received morality is, to a certain extent, demanded by the rights of individuals, and that its open violation is, in certain cases, inconsistent with those rights. For such violation of the principles of morality generally observed by the community, would constitute what is technically called a nuisance, and is as inconsistent with the comfortable enjoyment of existence, and property and the free exercise of the faculties in the pursuit of happiness, as a noxious smell, or poisonous exhalation. (*d*)

In this kind of rights is also included a certain right to the lands of the State, which is violated by its unjust appropriation by individuals; for without the right to a certain use of land, the existence of the individual is impossible, and it would seem also that there is a right to a certain equality of enjoyment in such lands. But the latter right is in its nature indeterminate, and can be realized only by the affirmative action of the State; to which, as in the case of all indeterminate rights, this function properly belongs.

And generally the social or non-political rights of the State includes all rights implied by the general right of the State to a free and natural development.

The *social* rights of the State, like private rights of ownership, are fully effectuated by their mere exercise or enjoyment, and, so far as respected, do not call for or admit of the intervention of the political power: whose sole function with regard to them is that of protection. Hence, were it not for their liability to be violated, or, in other words, were mankind uniformly just, and voluntarily disposed to observe them, private and social rights would include all rights whatever.

§ 55. *Of the Political Rights of the State.*

Hence, the political rights of the State, as we have seen, spring from the necessity of an organized force to protect private and social rights; and they may therefore all be summed up in the right to govern; which, as already observed, includes not only the right to use force directly for the protection of private and social rights, but also to use it for the organization, maintenance, protection and administration of the government; all of which are essential to the principal or final end; and also, within certain limits, to promote the common good.

The classification of the political rights of the State, or the rights of government, has been sufficiently indicated by the classification of its several functions. They consist first in the extraordinary *right of political organization*, and the *rights of the government;* the last of which are to be divided into the *judicial* and the *administrative* rights; the former of which is again to be divided into the *right of legislation*, and that of *ordinary jurisdiction;* and the latter, into that of the *right of legislation*, and that of *government* (*Imperium*).

The rights, as we have explained, are, however, necessarily more extensive than the corresponding functions,* and it will be necessary therefore to consider the limit to which they extend.

§ 56. *Of the Limit to the Political Rights of the State.*

This limit will vary under different circumstances. In a less advanced stage of civilization, in which public opinion, and especially the sentiment of rights is not highly developed, hardly any limit can be assigned to the powers of government; but in our modern civilization the powers of government are much more limited. The general principle governing the subject is, however, obvious, and is thus well expressed by Rutherford:†

"The civil power is in its own nature a limited power; as it arose at first from the social union, so it is limited by the needs and powers of such union, whether it be exercised as it is in democracies, by the body of the

* See *Supra*, p. 245.

† *Second Institutes of Natural Law*, p. 393.

people, or, as it is in monarchies, by one single person." In other words, the most obvious dictates of reason demand that the powers of government should, as far as practicable, be limited to such power as may be necessary for the performance of its functions.

This power must necessarily be very great; and we may even say of it, with Hobbes, "*Non est super terram potestas quae comparetur ei;*" but still, whether we consider the power of the ordinary government, or the general power of the State, it has its clearly defined limits. With regard to the former, such limits may be imposed by the State, in the exercise of its function of political organization, by constitutional limitations; with reference to the latter, this cannot be effected; but the obvious limit is in the common sentiment of rights which measures at once its *rightful* and its *actual* power; or, in other words, both its right and its might.

With regard to the right of government, as we have explained, the limit thus imposed is the rightful one, or, in other words, the State has no right to violate it. With regard to its actual power, or might, this limit is equally effective; for it is itself backed by the superior force, and it takes from the government, when this limit is exceeded, the only force upon which it rests, viz., that of popular opinion. Nor is it necessary, except in extreme cases, that this limit should be enforced by actual resistance or revolution. The fear of such resistance is in general sufficient, and this constitutes a sanction essentially identical in its nature with that which restrains the would-be robber or murderer.

This force operates also by simply producing the non-observance of the commands of the government. Without this, as we have explained, laws fail to become operative, and even laws originally operative cease to be so. The power of government is also often successfully resisted, and still more frequently evaded by individuals. In this respect *despotic* have no advantage over *constitutional* governments; in the latter of which the safety of the rulers and the observance of the laws are enforced not only by fear, but by the intelligent sentiment of the community; while in the former, not only are the laws in general less observed, in matters where the power of the sovereign does not reach, but the sovereign himself is frequently assassinated. Through these instrumentalities, viz, by fear, by force, and by evasion, a real and powerful restraint is imposed upon the power of the State by the manners and customs, or, in other words, the morality of the people, and especially by the sentiment of rights and by the force of popular opinion. For—as we have observed—no fact in the history of mankind is more obvious than that beyond a certain point the power of government is unavailing against the quiet but resistless operation of this force; and that, when opposed by it, laws in general are dead letters—either failing to take effect, or becoming obsolete as manners and customs change. This resistance indeed varies in different political societies; but its real and powerful efficiency—which, it may be safely affirmed, increases with the growth of civilization—is strikingly conspicuous in modern civilized nations of the world; in none of which can

any government continue to exist if the rights of life, liberty or property, or those arising out of the family relations should become insecure, either by reason of the inefficiency of the government or otherwise. Indeed, as we have observed, the most characteristic distinctness of modern civilization consists in the clear and more definite conception of rights generally prevailing, and the controlling power of this conception over government. It is *Nomos*, therefore (to use again the familiar saying of Hesiod), that is the only absolute king; and Leviathan is but his vicegerent; who, like other subordinate ministers, may, within certain limits, abuse the powers entrusted to him, but, if he undertakes to resist and defy the will of the true king, is sooner or later made to know and submit to his power. Briefly, therefore, the sentiment of rights in the human heart and the conviction that it is the right and the duty of every man, when there is no other resort, and where the infringement upon them is intolerable, to vindicate them by force, constitutes at once the rightful, and the only practical limit upon the power of the State; and hence—to quote again the expression of an eminent jurist—no State is capable of constitutional government unless composed of "men who know their rights," "and knowing dare maintain them." (*e*)

Opposed to this view is the modern doctrine of sovereignty as generally held in Europe and this country; which has been already fully considered.

NOTES.

(*a*) "By the term 'juridical (moral or fictitious) persons,' is meant everything other than a human being, which is regarded by the State as the proper subject of rights. To this class belong first, the State itself; then, in a monarchy, the ruler as holder for the time being of the highest power of the State; the treasury, or *fiscus;* and all State offices as regards the rights connected with them. It includes moreover corporations of every kind, all pious and charitable institutions (*piæ casuæ*) recognized and approved of by the State; and lastly, the inheritance of a person deceased, while it lies unacquired by the heirs (*hereditas jacens*). A corporation (*universitas, corpus collegium*) is a body of persons united for some permanent object, invested with the capacity of acting as a single person and recognized as a moral juridical person by the State" (Kaufmann's *Mackeldey*, §§ 141, 142).

"Artificial, conventional, or juristic persons are such groups of human beings, or masses of property as are, in the eye of the law, capable of rights and liabilities" (Holland's *Jur.*, pp. 74, 75).

In our law a corporation is defined by Chief Justice Marshal as "an artificial being, invisible, intangible and existing only in contemplation of law" (Dartmouth *vs.* Woodward, 4 *Wheat Rep.*, 626).

"It was chiefly," says Chancellor Kent, "for the purpose of clothing the bodies of men in succession with the qualities and capacities of one single artificial and fictitious being that corporations were originally invented, and for the same convenient purpose they have been brought largely into use. Accordingly, in the law, persons are divided into natural and fictitious ('persons in fact and persons by fiction of law')" (Muirhead's *Inst. of Gaius*, p. 570).

The distinction is thus admirably expressed by Hobbes, *Leviathan*, Chap. xvi:

"A person is he whose words or actions are considered either as his own, or as represent-

ing the words or actions of another man, or of any other thing, to whom they are attributed, whether truly or by fiction. When they are considered as his own then is he called a *natural* person; and when they are considered as representing words and actions of another, then is he a *feigned* or *artificial* person. . . . . There are few things that are incapable of being represented by fiction. Inanimate things, as a church, and hospital, and bridge may be personated by a rector, master, or overseer. . . . . An ideal, or mere figment of the brain may be personated, as where the gods of the heathen, which by such officers as the State appoint, were personated, and held possessions, and other goods and rights, which men from time to time dedicated and concentrated unto them. . . . .

"A multitude of men are made one person when they are by one man or person represented, so that it be done with the consent of every one of that multitude in particular. . . . . And unity cannot otherwise be understood in multitude."

(*b*) The nature of International Right or law is admirably explained by Vattel, in the Preface to his well-known work on the *Law of Nations*, from which we extract the following:

"Hobbes, in a work wherein he discovers great abilities, notwithstanding his paradoxes and detestable maxims: Hobbes, I say, was, I believe, the first who gave a distinct, though imperfect idea of the Law of Nations. . . . . This author has well observed, that the Law of Nations is the Law of Nature applied to States or nations. . . . .

"*Puffendorf declares, that he subscribes absolutely to this opinion espoused by Hobbes.* He has not therefore treated separately of the Law of Nations; but has everywhere united it with the Law of Nature properly so called.

"Barbeyrac, the translator and commentator on Grotius and Puffendorf, has approached much nearer to a just idea of the Law of Nations. . . . . 'I confess,' says he, 'that there are laws common to all nations or affairs, which ought to be observed by every nation with respect to each other; and if people call this the *Law of Nations*, they may do so with great propriety. But the consent of different people is not the foundation of those obligations by which they are bound to observe those laws, and therefore cannot take place here in any manner. The principles and obligations of such a law are in fact the same as those of the Law of Nature, properly so called. All the difference consists in the application made of it, varied a little on account of the difference that sometimes subsists in the manner in which societies discharge their affairs with respect to each other.'

"The author we have just quoted has well observed, that the rules and decisions of the law of nature cannot be applied merely and simply to sovereign States, and that they must necessarily suffer some changes according to the nature of the new subjects to which they are applied. But it does not appear that he has seen the full extent of this idea, since he seems not to approve of treating the Law of Nations separately from the Law of Nature, as it relates to individuals. . . . .

"This glory was reserved for the Baron de Wolfius. . . . .

"'Nations,' says he, 'among themselves acknowledge no other law, than that which natrue herself has established, it will therefore perhaps appear superfluous to give a treatise on the Law of Nations distinct from the Law of Nature. But those who think thus, have not sufficiently studied the subject. . . . .

"'When we would apply to nations, the duties which the Law of Nature prescribes to each man in particular, and the right it attributes to him in order that he may fulfill his duties; these rights and these duties being no other than what are agreeable to the nature of the subjects, they must necessarily suffer in the application, a change suitable to the new subjects to which they are applied. We thus see, that the Law of Nations does not in everything remain the same, as the Law of Nature, regulating the actions of individuals. Why then may it not be treated of separately, as a law proper to nations?'"

(*c*) "Though much has been said about *comitas*, it is an improper term; there is no such thing as a decision from complaisance; when jurists determine by the law of another country, they do it *ex justitia;* they are bound to do it. In questions of succession, for instance, England and Scotland have different laws; but if a man dies intestate in Scotland the English courts will not regard their own law in deciding on his succesion. They commit injustice if they determine by the English law. 'What is the Scottish law?' ought to be the very first question that they ask. If they do otherwise, they do wrong. The judgment of Eng-

lish and Scottish judges in such a case ought to be the same" (Per Macqueen, J. C., in Watson *vs.* Renton, 8 *Bell's Rep.*, 106).

(*d*) Thus for instance the peculiar mode of consummating the marriage contract used by Crates could not be admitted in modern society; or, to use a more familiar instance, the maintenance of houses of ill-fame, and other disorderly houses, is not to be permitted among the dwellings of respectable persons. This, I take it, to be the first of the three precepts of the law given us by Ulpran: "*Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere,*" *i. e.*, to live decently, to injure no one, and to render to every man what is due him—the first referring to the observance of morality, the second to the observance of rights of ownership, or rights *in rem.*, and the third to the performance of obligations.

(*e*) This principle, with some defects in application, is admirably developed in Von Ihering's *Struggle for Right:* "The end of the law," he says, "is peace; the means to that end is war. . . . . The life of the law is a struggle, a struggle of nations, of the State power, of classes, of individuals; all law in the world has been obtained by strife. Every principle of law which obtains had first to be rung by force from those who denied it, and every juridical right—the juridical right of a whole nation as well as those of individuals—supposes a continual readiness to assert and defend it." In illustration of his theme the author refers at length to the story of Michael Kohlhaas, by Heinrich Von Kleist, not as endorsing the conduct of the man, but as approving the sentiment and principle upon which he acted. There is another story with a similar motive, entitled *For the Right*, the author of which I forget, but of which Mr. Gladstone makes a similar use in a late English review. The manner in which these stories, and Von Ihering's work appeals to the heart of the reader, constitutes the most convincing demonstration of the depth and force of the sentiment of right, and the sentiment that the first principle of manly virtue is to vindicate it, if necessary, by force. In his Preface, Von Ihering informs us, with pardonable vanity, that his little work, at the time of his writing, 1877, had been translated into Hungarian, twice into Russian, and into modern Greek, Dutch, Roumanian, Servian, French, Italian, Danish, Bohemian, Polish and Croatian.

CHAPTER VII.

Of the Principles of Political Organization.

§ 57. *Aristotle's Classification of the Forms of Government.*

There are many principles upon which the forms of government may be divided, and as many different systems of classification. Hence, the several classifications adopted by political writers are numerous, and, on account of the neglect to distinguish between the different principles of division—it may be added—extremely bewildering. A certain unity, however, results from the fact that publicists generally seem to have agreed in accepting, in a more or less modified form, the classification proposed by Aristotle; with which, therefore, every exposition of the forms of government must naturally begin.

This classification is based on two distinct principles, and may be said to be a combination of the two corresponding classifications.

The first of these consists in the division of governments into (1) those which have, or, rather, are so constituted as to have *the common good* as their end; and (2) those which have for their end, the good of the rulers only. The former are called by Aristotle, *normal;* the latter, *perverted,* forms.

The second classification is based merely upon the consideration of the number of individuals in whom the supreme power of the government is vested. This, he says, "must be vested, either in an individual, or in a few, or in the many."* Accordingly, the several forms of government may be divided into (1), *Monarchy,* or, as Kant prefers to call it, *Autocracy,*† the government of one; (2) *Oligarchy,* the government of a few, and (3) *Democracy,* or *Ochlocracy,* the government of the many. But, with regard to the last, the term "democracy" is misleading. The *demos,* or people, consists of all the members, or at least all the free members of the community, men, women and children, all of whom cannot participate in the government; and the term, "*ochlocracy*"—the government of the mob—though more accurate, carries with it an opprobrious sense, that is out of place in the impartial realm of science. The occasion, therefore, seems to demand the invention of a new term, and perhaps no better for the purpose can be suggested than the term *Pöly-archy;* which precisely expresses the idea intended, without either approval or disapproval.

Combining these two classifications, there will result six forms of government—three normal and three perverted.

Of these the normal forms are called by Aristotle, (1) *Monarchy,* the

*Pol., iii, Chaps. vi, vii.

† *Phil of Law,* p. 207.

government of one ; (2) *Aristocracy*, the government of the best, *i e.*, of a class so regarded, and (3), *Polity*, so called in the Politics, for lack of a distinctive name ; but, in the Rhetoric, called *Timocracy*, the government of the worthy.

The three perverted forms are, (1) *Tyranny;* (2) *Oligarchy*, which, on historical grounds, he defines as a government of the rich (*Plutocracy*), and (3) *Democracy*, which, on like grounds, he defines as the government of the poor.

It needs but little reflection to perceive that what Aristotle calls "the perverted forms" of government are in fact the historical forms invariably presented. And, as all constantly recurring historical phenomena must be regarded as resulting from some law or principle of human nature, they must be regarded as the actual or real forms of government ; and the normal forms as merely ideal. We may, therefore, regard the former as Aristotle's actual or historical classification, disregarding the latter ; and accordingly this is the form in which it has been generally received in modern times—the received division of governments being into (1) Monarchy, (2) Oligarchy, improperly called Aristocracy, and (3) Democracy, or Ochlocracy ; and this division, rejecting the inappropriate term, "aristocracy," we will adopt as our classification of actual governments.

It is, however, obvious that the utility of a historical classification of governments consists merely in presenting them in a form convenient for investigation, and that the object of such investigation is to discover the true, or ideal forms, which, perhaps, we may never fully realize, but to which it is the object of political science to enable us to approximate. We must examine, therefore, more particularly Aristotle's views as to the latter, as contained in his division of governments, into those which do, and those which do not, regard the common good as the end of the State.

§ 58. *Of Constitutional and Absolute Governments.*

On this point it is first necessary to observe that the term, "*the common good*," here used—like the principle of Utility, of which it seems to be an expression—is a very indefinite term, and, with politicians, as a practical rule, extremely dangerous ; for, as we have observed, though the principle of Utility—rightly stated—is a sound one, that of General Utility, or Utilitarianism, which is the form of the principle most commonly used, is a dangerous and even pernicious principle of polity ; being, of all the weapons of political knavery, and political stupidity, the most effective ; and we may, therefore, say of it, as Austin untruly says of conscience, that it is merely "a convenient cloak for ignorance, or sinister interest." But these observations are not to be regarded as strictures upon Aristotle's views, but rather as intended to prevent his being misunderstood. For, though he here uses what, on account of its indefiniteness, and also on account of the prevalence of the Utilitarian philosophy, is, at this

time, a peculiarly objectionable expression, viz., "the common good," he is elsewhere careful to explain that "the political good is justice" (*Pol.*, Bk. iii. Chap. xii); of which he says, "all others must yield her the precedence" (*Id.*, Bk. iii, Chap. xiii), and that it is "the rule of the social State, and the very criterion of what is right" (*Id.*, Bk. i, Chap. iii); which is an anticipation of the view of German philosophers, that the State is a *jural institution* (*Rechtsstaat, status juris*), and that its essential end is the realization of justice.

Thus understood, this division of Aristotle agrees precisely with that of Mr. Ahrens; according to which there are two kinds of States only, namely, the *jural* and the *despotic;* (*a*) the former of which, he agrees with Aristotle in thinking, can only be secured by a participation of the people in the government.* This division is thus explained by Mr. Ahrens:

"The principle of life of the State is Right (*droit*), and there is only one just form of the State; it is that which, by the mode in which its powers, and their relations to the national life are organized, assures the reign of right (*regne de droit, Rechtsstaat*) as the ethical and objective principle, to which the will of all ought to be submitted, and as the organic principle which guarantees to all its members and parts their position, and free action, and participation in the exercise of all the political powers. The *Jural State* (*L'Etat de Droit—Rechtsstaat*) is then the *normal* State, formally organized, of which self-government forms the most salient characteristic. The opposite of the jural State is despotism, the arbitrary personal will, which puts itself in the place of right, and of law enacted by the free consent of the people, and efficaciously controlled in its execution. Between the *Jural State*, and despotism, there are without doubt many intermediate terms; but the way to despotism is opened, whenever a government, in matters of public order, puts its own, in the place of the action of its citizens, and carries into effect its personal will, without seeking to know, or without respecting the national will." †

§ 57. *Of the So-called Ideocracy.*

Mr. Bluntschli, while agreeing generally with Aristotle, thinks a fourth form of the State should be added, the normal form of which he calls "*ideocracy,*" and the perverted form, "*idolocracy;*" and which is defined by him as the State "in which the supreme power has been attributed either to God, or some other . . . . superhuman being, or an Idea." "This form," he says, "can exist only in a theocracy"—which, accordingly, he uses as an identical term.‡ But Aristotle's doctrine of the supremacy of the law, (*c*) or, as expressed by Hesiod, "The reign of King Nomos" (*Nomocracy*), or, in the language of modern times, "the sovereignty of the law," or, still better, "the sovereignty of right," comes equally within the definition. It is, however, obvious that, in

* *Pol.*, Bk. iii, Chap. vii, *et seq.*

† *Cours De Droit Naturel*, Sec. 114. (*b*)

‡ *Theory of the State*, pp. 331-338.

either a theocracy, or a nomocracy, the real rulers must necessarily be human beings, and the form of government must, therefore, be either a monarchy, an oligarchy, or a polyarchy; which, indeed, seems elsewhere to be admitted by Mr. Blunstchli. (*d*)

The modern doctrine of Sovereignty, in whatever form it be asserted—whether as the sovereignty of the government, or that of the State or people—is but an *ideocracy;* for, in either case, the supposed sovereign is merely a body politic, or a fictitious or imaginary person, or, in other words, an idea. Of the two forms of the doctrine, the latter—*i. e.*, the sovereignty of the State or people—is an example of the *normal* form of *Ideocracy;* and, as we have observed, its use, as a metaphor expressing the notion that there is a higher power than that of government, is to be encouraged; though it must yield, in the importance and dignity of the truth expressed, to the nobler doctrine of the Sovereignty of Right, or Justice, or, in other words, of King *Nomos*. The other doctrine—*i. e.*, the sovereignty of the government—presents an equally striking example of the perverted form of *Ideocracy*, called by Bluntschli, *Idolocracy;* of which Austin and the modern English, or so-called, "Analytical" school of jurists may be taken as the peculiar representatives; their *idol* being the "Mortal God" created by Hobbes, and called Leviathan.

§ 59. *Of the So-called Mixed State.*

Mr. Bluntschli—whose own doctrine, indeed, is a kind of Ideocracy—has emancipated himself from this idolocracy to a certain extent. He denies emphatically the absolute power of the sovereign. (*e*) But he himself regards the State as "a living, and therefore organized being," with a "soul and body," a "will," and "active organs,"* in short as a "moral organized masculine personality,"† with a "psychological and human nature." ‡ (*f*) And from this he infers that the supreme power of the State, or sovereignty, is indivisible, and from this again, he deduces many illegitimate conclusions.§

Of these one of the most important is presented by his views as to the so-called Mixed State, as described by Cicero and others—a subject of much importance to which we will briefly refer. (*g*) The possibility of such a State is repudiated by him; and with this conclusion no fault can be found. For, in a constitutional monarchy, as in every constitutional government, the supreme power is vested in more than one, and it is, therefore, according to Aristotle's definitions, not a monarchy, but an oligarchy, or aristocracy. (*h*) But the reasoning of Mr. Bluntschli—which rests entirely upon the notion that sovereignty is indivisible—and also his conclusion that the limited monarchies of modern Europe are monarchies in the sense of Aristotle—is untenable.

* *Theory of the State*, pp. 18, 19.

† *Id.*, p. 23.

‡ *Id.*, p. 76.

§ "Sovereignty implies . . . . *unity*, a necessary condition in every organism" (*Id.*, p. 495).

In every constitutional government the sovereign powers are, in fact, divided. Hence, to avoid this difficulty he is, as it were, compelled to misconceive and misconstrue the principle of Aristotle's classification; which is that "*the supreme power over the whole State,*" language that can mean nothing else than sovereignty, *i. e.*, the aggregate of all sovereign powers—"must necessarily be in the hands of one person, or of a few, or of the many."* But Bluntschli asserts that, according to Aristotle, it is the vesting, not of the whole sovereignty, but of "the governmental authority" only, which determines the form of the State; and from this "governmental" (or *regal*) "authority" "the legislative power" is expressly excluded." "But this" (the *governmental* or *regal* authority), he says, "is unsusceptible of division, and, therefore, as it forms the principle of Aristotle's classification, there cannot be a fourth form of government. But on the same principle he might deny also, that either aristocracy or democracy is possible; for in both these forms the *governmental* power is—as we have seen—divided. (*i*)

Accordingly he asserts—as, on the principle of the indivisibility of the sovereign powers, he necessarily must—that in every so-called mixed State, "the supreme governing power"—which can mean only the sovereignty—is in reality either "in the hands of the monarch, or, of the aristocracy, or, of the people."† (*j*) And this is true provided we accept his new definition of sovereignty, as including only the *governmental* or *regal*, or, as it is usually called, the *executive* power, but according to the commonly received sense of sovereignty, and according to Aristotle's definitions, altogether false.

This peculiar notion of sovereignty is strikingly illustrated by Mr. Bluntschli's views of the English Constitution; which are, in effect, that the English government is still a monarchy in Aristotle's sense of the term. (*k*) And, on the other hand, there are those who hold the opposite notion, equally unfounded, that the House of Commons is the sovereign; as was, in effect, asserted by Mr. Gladstone, in a late speech denouncing the rejection of the Home Rule Bill by the Lords as unconstitutional, and as is asserted in terms by Sir Frederick Pollock. (*l*) And also by Mr. Burgess; who says (*Pol. Science and Const. Law*, p. 96), that the House of Commons "is now the perpetual constitutional convention for the amending of the Constitution." But this view is obviously erroneous—as was practically manifested by its inability to enact the Home Rule Bill, and many other similar cases. Mr. Gladstone's denunciation of the House of Lords, on the occasion referred to, and his threat to abolish it, was, therefore, in effect, a threat of revolution; for the powers of the lords, as well as those of the king, are, like those of the Commons, vested in them by the fundamental law, and they cannot be involuntarily deprived of them unless by revolution. The extent of the power of the House of Commons is merely to force the government to dissolve it, and thus to appeal to the country. Hence, the view of Mr. Austin is more logical, that the

*Bk. iii, Chap. vii. † *Id.*, p. 332.

sovereignty apparently exercised by the House of Commons is vested, not in the House, but in its constituency. (*m*)

The view of Bluntschli that the king, and that of others, that the House of Commons is the exclusive sovereign, are, therefore, equally untenable. Sovereign power is undoubtedly vested, and, since the Commons became a constituent part of Parliament, has always been vested in each of the three coördinate branches of the government; as, previously to the event referred to, it was in the king and lords.

§ 61. *Of the Essential Nature of Constitutional Government.*

Bluntschli's doctrine, as to the indivisibility of the sovereignty, is obviously inconsistent with his own theory that it is limited. For, regarding sovereignty merely as the supreme, or *highest* political power, it is clear that, if exclusively vested in the governmental or executive department of the government, it cannot be limited by the legislative, or the judicial department; for this would be to vest in some respects, a higher power in the latter. The argument of Austin on this point * is conclusive. Hence, all constitutional government must consist of divided sovereign powers; and this in fact constitutes the essential difference between such governments, and despotic governments; where the sovereign powers are concentrated in one hand. Hence, the most fatal aspect of Mr. Bluntschli's argument is that, if it be true, constitutional government is impossible; for the very essence of all constitutional government—it is universally admitted—is that the legislative power, within its province, must be supreme; and, in this country, it is regarded as equally essential that the judicial power also shall be so. Hence, it may be said that every American State, federal, or constituent, is in fact a *triarchy*, consisting of three sovereign departments, "existing side by side, each independent of the other;" each of which may, without much impropriety, be called, with reference to the power vested in it, a sovereign. This state of things is indeed regarded by Mr. Bluntschli as impossible, at least as a permanent institution;† but so far is this from being the case, that such division of powers is, in our own case, universally regarded as the surest foundation of permanency. And, it may be added, that some such division of sovereignty is an essential and necessary condition of permanency in all States whose people are capable of vindicating their rights; for no free people will willingly submit to despotic power.

That from this division of powers conflicts may arise is inevitable; but this is a necessary condition of human life, and perhaps essential to human development, individual and political. Such conflicts may indeed even result in civil war, and in fact have done so in numerous cases; but this is but one of the means by which rational government, political freedom, and civilization have been developed. Nor is it possible to preserve the fruits gathered from our painful experience, in any other way than by

* *Supra*, p. 205.

† *Theory of the State*, pp. 333, 334.

maintaining, as our forefathers did, the principles of right, public and private, not only by argument, but when necessary, by force, and, in last resort, by arms.

Nor, indeed, as one might think is the case, from the difficulty encountered by modern publicists in conceiving the possibility of a government of mutual checks and balances between the powers of several departments of government, is the world without abundant experience on this point. The English people, throughout a history of over eight hundred years, has presented a most conspicuous, and, it may be added, valuable example of such a government. The distribution of the sovereign powers first between the king and the lords, and afterwards among the king, lords and Commons, did, indeed, provoke conflict, and numerous civil wars. But to this principle of the division of sovereignty, and the wars resulting from it, the modern world owes the idea and the possibility of constitutional liberty. And now that the conflict has for a while ceased, the only fear is that the results of such painful labor and struggle may be ignorantly lost, and government become a mere representative democracy without constitutional checks. If this should prove to be the case, the result will be attributable mainly to the supremacy of the Austinian philosophy, and especially to the doctrine of the indivisibility of sovereign power.

Another illustration of the principle is presented by the Roman republic; where, as we have seen, there existed, side by side, without affecting the permanency or efficiency of the government, two sovereign and coördinate legislatures, and two sovereign consuls, each vested with full regal powers, and also, alongside of the regular government, the political organization of the whole people, an independent sovereign organization of a class, namely, the *Plebs*, represented by the tribunes of the people, in each of whom was vested the power to *veto*, or nullify all the acts of the other departments and officers of the government, including even those of his own colleagues. (*n*) The English and the Roman constitutions are admittedly the most successful that history presents. Other instances might be cited, but these will be sufficient.

Recapitulating what has been said, it will be observed, and cannot be too often repeated, that the divisibility of the sovereign powers of the government constitutes the essential characteristic, or specific difference of constitutional government; and consequently governments may be divided on this principle into two classes, namely, the Constitutional, and the Absolute or Despotic; the former of which consists of those in which the sovereign powers are distributed among several classes of officers or departments, the latter of those in which the whole sovereign power is centred in a single officer or assembly.

§ 62. *Of the Principles that Should Govern the Distribution of the Sovereign Powers.*

To determine the modes in which the sovereign powers of the State may be most safely and efficiently distributed in the government, is the great problem of political organization. This problem, however, does not admit of any general solution, but is to be differently solved according to the character of the people, and the circumstances that surround them, and especially the grade of civilization that characterizes them. There are, indeed, certain general principles governing the subject, that have been evolved by a long and painful experience, and which, when well understood and applied, may be accepted; but in general, the particular mode of their application must be determined, in a large measure, by experience, and by the natural development of political institutions. For no fact in the constitution of the State is more obvious or more important than that the political institutions of the State are mainly the result of a natural or organic development; and that, in this fundamental matter, as in all others, the extent and limit of human power is to modify this development, either by conserving, improving, and perfecting it, or by hindering and destroying it.

Hence, it is a principle of political organization, as obvious as it is generally disregarded, that political reforms should be cautious and gradual, and such only as are clearly and obviously suggested by the necessities of the times, and a thorough knowledge of existing institutions, their nature and significance, and their practical operation; for, obviously, political innovations are too serious to be undertaken until necessity demands, and they never can be safely adopted without a just appreciation of their effect upon the existing order. On the other hand, reform is as essential to preserve the body politic in health, as are the cares of the physician to the natural man; and, looking back to the experience of the nations that have appeared and disappeared on the theatre of the world's history, it may be said that their decay and death, when not occasioned by external force, have been the result of defects in their political institutions that might have been reformed. Hence, as it were, we have to pass between Scylla and Charybdis; and it is almost impossible to avoid, on the one hand, the dangers of injudicious reform, and on the other, those of stupid conservatism. (*o*)

Hence, from a logical and scientific point of view, no principle of party division could be more irrational than that on which parties are in fact usually divided, and which is founded upon the distinction between conservatives, and radicals or liberals. The wise man will be either, as the occasion demands; or, rather, he will, at all times, be both; that is, liberal, and even radical, in thought, but conservative in sentiment and in practice. And this suggests another important consideration, which is, that the permanent organization of political parties is itself irrational, and, as constituting *imperia in imperio*, inconsistent with a rational and

efficient political order. That parties should exist, is not only desirable, but inevitable; but that they should be organized in permanent corporations, as they are, is a different matter. On the contrary, it seems obviously desirable that the division of parties should take place with reference to each important political question as it may arise, and that their duration should be determined by the duration of the controversy. And hence it follows, that instead of the people of the country being divided into two great hostile political organizations, determined entirely by federal politics, there should be a different division of parties in State, from that existing with reference to federal politics; and again, that there should be another and entirely different division in counties and cities, with reference to their local affairs; and that parties thus formed should be of only temporary duration. This, indeed, in view of the influence of custom and association, is hardly to be hoped for. But the evils of the existing system may, to a large extent, be remedied by the increase of men capable of independent thought and action, and of disregarding parties, except so far as they may find them fitting instrument of attaining rational political ends.

This apparent digression has been rendered necessary by the necessity of guarding against the fatal delusion that in practical politics, theoretical principles are always to be put immediately in practice; and, it may be added, that in general the sole instrument or means by which political theory is to be realized is general opinion; which should lead and not follow legislation.

With this caution, we will now return to the consideration of the theoretical principles that should govern the distribution of sovereign powers.

(1) An obvious principle upon which this distribution may proceed is that of locality; which is the principle observed in the constitution of federal States, where, as we have seen, the sovereign powers are divided between the federal and the constituent States. The nature of this kind of government has already been considered at length. Certain publicists, as we have seen, deny the possibility of such a division of the sovereign powers, and hence, in effect, the possibility of the federal State; but it has been shown, that this view is untenable. It may be added, now, that, in view of the tendencies manifested in the history of the race, it is to this character of State that we must look as the principal instrument of the advance of political civilization in the future.

In the historical evolution of States, we observe a constant tendency to the enlargement of the territory and population embraced under the jurisdiction of the State. Thus, we have seen the primitive clan, or *gens*, absorbed into the village, and this again into the ancient city, and this finally by the great Roman empire; and this has been followed by the feudal States of mediæval, and the great national States of modern times; and, it is to be apprehended, that this tendency unless modified may go on, unchecked, to results not now anticipated. (*p*) Of the several classes of States thus evolved, we may take two as representative types; namely,

the ancient city and the modern State, or empire. Of these there cannot be any doubt that, so far as yet disclosed in history, the first is the more perfect type; or, in other words, it is the type of State that has most perfectly fulfilled the essential end of the State; namely the harmonious development of the individual: and that the modern State, though perhaps of a higher order of development, cannot be compared with the city State of the ancient world in this respect. Fully to establish this proposition, would necessitate a historical disquisition too extensive for these pages; (*q*) but the fact will be made sufficiently clear by a comparison of any modern State with that of Athens—an insignificant country in point of numbers and extent, but which has played a greater part in the history of the race, and the development of its civilization, than any of the great empires of the world. On the other hand, this type of State presented one essential defect, which was, that on account of its size, it proved itself unable to cope with external aggression, and thus, in the development of larger political organizations, necessarily succumbed. On this account, it has been condemned, in unqualified terms, by publicists generally; who have consequently come to regard this capacity for large political organization as the distinguishing mark of the political genius of the people. In this, they are undoubtedly right, to the extent that this capacity, under the conditions that are presented in human history up to this time, has been essential to political existence. But it is equally obvious, from experience, that the organization of large States, while under existing conditions, essential to political existence, carries with it many evils; and especially, that it is to a large extent injurious to the development of the individual, morally and intellectually. Hence, it seems evident that a combination of the advantages of the larger and the smaller State is desirable, and this is precisely what is effected by the federal organization. It is, indeed, impossible, in modern times, and in view of the immense development of population and business interests, to return to the city State; but smaller political organizations of sovereign character, such as in our country are presented by the States of the Union, are possible; and these generally are sufficiently limited in population and territory to subserve the same purposes as the city State.

In Europe, where the existence of each State is threatened by hostile powers, its policy, under existing conditions, must be determined by this sole consideration. But here in America we are absolutely free from such considerations; and an opportunity for political development is thus given us which has never before, in the history of the race, been presented to the same extent; and nothing but political prejudice, born of circumstances that no longer exist, can stand in our way. To what extent this circumstance in our situation may or should influence our future development, is to some extent illustrated by the history of our mother country; which, by reason of its isolation, alone of the countries of modern Europe, has been able to develop a liberal and rational constitution.

In this country, also, it is to be observed, that under our federal Consti-

tution, the separate States, which are sovereign as to nearly all the great interests of society, are in a position to reform their political organizations, free from all fear of foreign interference; and hence, that they present the most appropriate and hopeful fields for the operation of political reform.

With these observations upon the federal State, we pass to the consideration of the distribution of sovereign powers in the government of each State.

(2) The first great division of powers to be considered, is that between the ordinary government and the constituent electorate. This distinction is more or less ignored, or, at least, its significance misunderstood, by European publicists; but it is clearly marked out, in this country, by our actual constitutional practice. With us, as is expressed in the phrase, the sovereignty of the people, the electorate is regarded as supreme, or, in other words, sovereign; but, in asserting this proposition, it must always be understood that its power is limited, as is all other political power, by the principles of right.

With regard to the composition of the electorate, or, in other words, the qualifications of electors, I know of no principle that can be asserted as universally true. We have adopted, practically, that of universal suffrage, and the rule of the majority; but with regard to the former, it is admitted by all, that a certain degree of political civilization is required in order to make the principle practically efficient; and we may therefore assume that the doctrine of universal suffrage does not assert a natural and inalienable right, but that it is to be regarded, among people of sufficient political virtue and intelligence, as the best practicable solution of the question.

With regard to the rule of the majority, as existing under our present political organization, our approval must be even less unqualified. The existing operation of this principle may be considered in two aspects; viz., as to its *theoretical*, and as to its *practical* working. With regard to the former, the legislative power—in which the other powers of the government have been largely absorbed—is supposed to be exercised by our representatives. Our government, therefore, is, in theory, though not according to the common notion, an oligarchy, consisting of our chosen representatives; but this, in fact, is not the case. The rulers of the country are, in reality, the majority of the representatives; and these represent, not the whole of the electorate, but simply the majority of the electorate; and the minority, in many States, as, for instance, in the Southern States, and in the Eastern States, with one exception, and in most of the old Northwestern States, are as completely and permanently disfranchised as though they lived under the Czar of Russia. But, practically, even this is not realized. The actual constituency of the representatives does not consist of the electors generally, or even of the electors assembled in conventions, but of the professional politicians and party leaders; so that we are really living under an oligarchy, constantly alternating from the political managers of one party to those of the other.

It seems, therefore, that in this respect a reform is imperatively demanded, at least in the State governments; and the nature of this reform is equally obvious. It consists of the principle of *proportional representation*, the most approved form of which is that known as the Hare plan; with reference to which, it may be said, as far as it is possible to foresee the result of an untried experiment, that in it is to be found a remedy for the principal political evils of the day: For, first, it will emancipate minorities, and our legislative assemblies will become truly representative, representing minorities as well as majorities; secondly, it will altogether dispense with political conventions and professional politicians; thirdly, it will restore to the individual citizen, who desires to participate in the government of the country, that independence of thought and of action of which, as a condition of entering into politics, he is now absolutely deprived; and, fourthly, it will admit of the facile organization of third parties, representing all the several interests, opinions and principles, existing in the country; and thus, in place of the dead level of character, and intellect, that is engendered by the existing system, it will substitute the free and harmonious development of all the natural tendencies of society.

(3) With regard to the distribution of sovereign powers in the government, the most general principle that should govern our conclusions is suggested by the consideration that the State, as expressed by the German publicists, is a *jural* State (*Rechtsstaat*), or, in other words, that its principal end and function is to establish justice; which can be practically effected only by protecting the rights of men, individually and collectively, from the aggressions of human power, whether exercised by individuals, or the State.

(4) To effect this end, it is necessary that a judicial power should be constituted, competent to determine controversies between individuals, and between individuals and the government, with reference to their mutual rights and obligations; and, in order that the judicial power may be adequate to the performance of this function, it is obviously desirable that it should, as far as possible, be independent, or, in other words, sovereign, and therefore coördinate with the other sovereign departments or officers of the government.

(5) It is necessary to the efficient administration of justice, that with reference to rights otherwise indeterminate, general rules should be established; and, as we have already shown, the establishment of such rules, determinative of questions of right, constitutes part of the function of the judicial department. But the function of establishing such rules, or, in other words, the function of *legislative jurisdiction*, or *judicial legislation*, should be distinguished from that of ordinary jurisdiction, and should be vested in a different body, or organization, from that of ordinary judges. Hence, in the most efficient organization of the judicial department, it would consist of the courts, and of a judicial commission, or legislature. It is to be observed, however, that the performance of the respective functions of these two departments should be governed by the same con-

sideration, namely, that justice should be observed; and hence, there seems to be no necessity for regarding them as separate and coördinate departments, but rather as two different organizations in the same department, charged with essentially the same functions.

(6) But the judicial department is itself a part of the government, or political organization of the State; which is charged generally with the maintenance of the State, and its defense against foreign and domestic enemies, and also with the protection of the rights of individuals against aggression: and hence, among its functions is that of protecting the people, and the State generally, against the abuse of the judicial power, as well as against the abuse of the other powers of the State. These functions of the State, exclusive of its judicial functions, we have been forced, for lack of a better term, to call its *administrative* functions. These must be divided, again, into the *legislative* function, and the *governmental*, or, as it may be otherwise called, the *imperial* function, and each of these, in an efficiently organized government, should in the main be vested in independent officers and departments, namely, the *legislative* and the *governmental* departments; each of which should be coördinate with the other, and with the judicial power, and, in its sphere, supreme, or sovereign.

(7) The above division of functions, as will be observed, accords, in the main, with the received division of the functions of the State, into the *executive*, the *legislative* and the *judicial*. It differs from it, however, in the following respects: Under the received division of functions, as exemplified in our own constitutions, and those of other States, the *legislative* department improperly exercises the function of *legislative jurisdiction*, and also many of the *governmental* functions. The former, as we have said, should be vested in the judicial department, and the latter should be restored to the governmental, or so-called executive department of the State.

(8) The nature of the legislative department, and of its functions, are sufficiently familiar not to require an extended explanation. It will be sufficient, therefore, to accept the general view upon the subject, noting only where it requires to be modified. Of which modifications, the first to be observed is, that it is not to be regarded as including the function of legislative jurisdiction, or juridical legislation, now generally exercised by it, but which, according to the view we have taken, ought to be vested in the judicial department.

In addition, it may be observed that it is a matter of grave doubt, whether, in other respects, the modern representative legislature might not, with advantage, be materially modified, and its functions largely reduced. Originally, the legislative power operated simply as a check, or limit, to the exercise of the governmental or *regal* power; against which it was its chief function to protect the lives, liberties and property of the citizen. And this function, as illustrated in English history, was accomplished by effectually establishing, first, the principle that no man shall

be deprived of life, liberty or property, except by due process of law; secondly, the practical independence of the judiciary; and, finally, the exclusive control of the limit, and the ways and means of taxation, by the legislative department. Ultimately, however, the governmental, or *regal*, power was, in England, transferred from the king to a parliamentary commission, depending, in effect, for the continuance of its official existence, upon the House of Commons; by which, on the whole, the function is fairly well administered. But in this country, while the governmental functions are still, to a considerable extent, left in the President, or other head of the government, they have, in the main, been absorbed by the legislative department, and are necessarily exercised by it through committees of a temporary nature, generally unknown to the public, and hence, to a large degree, irresponsible. Thus the governmental, and the legislative functions, having become, in the main, united in the legislative body, the power of taxation has become entirely unlimited, and the property of the citizen has come to be wholly at the mercy of the irresponsible power of the legislature; and thus, the principle of the immunity of private property from governmental aggression, established in the mother country by the bloody struggles of six hundred years, has been entirely eradicated from our Constitution. The only difference is, that the unlimited power of taking the property of the citizen, once asserted by the king, who might, at times, be able and honest, is now freely exercised, without challenge, by bodies of men, who, experience seems to teach us, cannot possibly be either. Hence has resulted the constant increase of taxation, both in the federal and constituent States, and in municipalities and counties; and the obvious fact is disregarded, that taxation may be carried to the extent of actual confiscation of all visible property, and may thus result—as it did in the case of the Roman empire—in the actual destruction of the State. For this evil, the obvious remedy would seem to be, to take from the legislative, and to restore to the governmental department, all strictly governmental functions, including the initiative of all legislation, and especially of legislation determining the amount of money required for the needs of the government, but leaving to the legislature, to whom the function properly belongs, the initiative of determining the ways and means of raising the amount required.

This, indeed, would necessitate a large increase in the powers and functions of the government, or governmental department. But this, too, is desirable, and indeed is one of the most pressing demands of our age and country; and it cannot be doubted that governments vested with larger powers and more responsible functions, and thus naturally enjoying that respect and consideration for the governmental power that has almost died out with us, would be capable of more efficient service than under our present system.

(9) The nature of the *governmental* power is more complicated and less familiar than that of the legislative department. It is best expressed by the terms, *royal, regal, imperial;* all of which have been applied to it

by eminent publicists.* Generally, it may be said that it is vested with the function of executing the enactments of the legislative department; and hence it has been called the Executive Power. But this, as we have observed, is but a subordinate function, and in addition to it, the government is charged with the function of supervising all the departments of the government, in the exercise of their functions, and also with the supervision of the welfare of the State generally. And among its other functions, in the opinion of eminent publicists already referred to (in which I entirely concur), it ought to be charged mainly, though not exclusively, with the initiative of legislation, and to a greater or less extent, with the veto power.

This extensive increase in the functions of the government, and of the respect and consideration in which it is to be held is, indeed, opposed by our democratic prejudices; but, in fact, these functions must exist somewhere, and when not vested in the head of the government, will be exercised, not by the legislative power, which is incapable of performing them, but by temporary legislative commissions.

The expediency of this change rests, in addition to what has been said, upon the obvious consideration that the administration of political affairs, outside of the judicial department, is merely a matter of business, differing from ordinary business only in the fact that it is infinitely more complicated and difficult to be performed; and as in ordinary business, men trained to its administration are essential, so, *à fortiori*, it is necessary that the business of the government should be conducted by men of trained efficiency, and in the main of permanent tenure of office; and this can only be effected by vesting the governmental functions in a thoroughly organized department, the leaders of which, as in all other business operations, should be few in number, and thoroughly competent. On the other hand, it is an equally obvious consideration, that the legislative body should consist of men taken from the people at short intervals, and in close sympathy with them, and, in fact, representing them in their opinions and sentiments. To this end, it must necessarily consist of many members, and therefore be incapable, as a body, of exercising governmental functions.

NOTES.

(a) This seems to agree also with the division made by Kant, as explained by the author: "According to Kant, there are two governmental forms—the *republican* and the *despotic*—the first, which is alone capable of securing a good administration, exists where there is a division of powers; the second, where all the powers are united in the hands of the sovereign, individual or collective" (*Cours de Droit Naturel*, 117).

It is also the division of Mr. Calhoun, and is thus clearly explained by him:

"Constitutional governments, of whatever form, are, indeed, much more similar to

* *Supra*, p. 264.

each other, in their structure and character, than they are, respectively, to the absolute governments, even of their own class. All constitutional governments, of whatever class they may be, take the sense of the community by its parts—each through its appropriate organ; and regard the sense of all its parts, as the sense of the whole. They all rest on the right of suffrage, and the responsibility of rulers, directly or indirectly. On the contrary, all absolute governments, of whatever form, concentrate power in one uncontrolled and irresponsible individual or body, whose will is regarded as the sense of the community. And, hence, the great and broad distinction between governments is —not that of the one, the few, or the many—but of *the constitutional*, and *the absolute*."

Thus far, I think the principles of concurrent majorities, as expounded by Mr. Calhoun, is generally conceded in this country by thinking men; nor do I know of any serious difference of opinion among American statesmen and publicists of approved reputation prior to the war. The heated controversies between parties, represented in the popular imagination by Webster and Clay on the one hand, and Calhoun and Hayne on the other, was merely as to the application or extension of the principle. Mr. Calhoun in effect held that the principles of rational constitutional government required that every class or minority of respectable proportions, which by sectional division, peculiar interests or otherwise, stood permanently separated and distinguished in opinion and in interest from the rest of the community, should have, as the only efficient means of self-protection, a veto power; which, as a principle of political science, was but to assert the right of every community of considerable proportions to self-government; but he further asserted, as a principle of the actual constitution, the right of every State to nullify a law that it deemed unconstitutional, or, as a last resort, to withdraw from the Union. This was the actual issue; which, in its result, consigned to obscurity the works of one of the purest statesmen, and one of the most acute, profound, and analytical minds of modern times, and which finally terminated in a war that cost a million lives, and billions of money. Upon the merits of the question, in view of the passions engendered in this country by the struggles of a century, and the culminating horrors of civil war, it is too early yet to justify a discussion. We have entered upon it simply for the purpose of showing that the principle of the division, not only of the sovereign powers generally, but also of the legislative power particularly, is not in question—for to deny it is to deny the possibility of constitutional government—but the question of the extent of its application only.

(*b*) Mr. Ahrens, while agreeing with Aristotle's division of States, is, I think erroneously, of the opinion that it "touches only the surface of political relations," and he adds, "that it is necessary to determine the form of the State according to its fundamental idea, or according to the principle which animates all political organization, and which gives it its type and its principal character" (*ib.*). But this, as we have seen, is precisely the method pursued by Aristotle, whose conclusion seems also substantially to agree with his own.

(*c*) "He who bids the law be supreme, makes God supreme, but he who entrusts man with supreme power, gives it to a wild beast, for such his appetites sometimes make him" (Bk. iii, Chap. xvi). "The supreme power should be lodged in laws duly made" (Bk. iii, Chap. xi).

(*d*) "Some French statesmen with good intentions, but without much success, have attempted to oppose to this destructive conception of the sovereignty of the people, the idea of the sovereignty of reason or justice. . . . . The error which recognizes the only fundamental form of State in absolute democracy is here opposed by the error of ideocracy" (*Theory of the State*, pp. 499, 500). But, as the author justly observes, in this doctrine the fact is overlooked that "right can only belong to a person, and that political supremacy can only be ascribed to a political personality."

(*e*) "Louis XIV and the Jacobins of the Convention of 1793," he says, "alike regarded themselves as omnipotent. Both were wrong. Modern representative government knows nothing of absolute power, and there is no such thing on earth as absolute inde-

pendence. Neither political freedom, nor the right of the other organs and elements of the State are compatible with such unlimited sovereignty, and wherever men have attempted to exercise it, their presumption has been condemned by history. Even the State as a whole is not almighty, for it is limited externally by the rights of other States, and internally by its own nature and by the rights of its individual members" (*Theory of the State*, p. 494).

(*f*) "This," he says, "is very clear to him, but as there are persons, sometimes educated persons, who have no musical ear, or are completely insensible to the beauty of a painting or a drawing, so there are many learned men who are complete strangers to organic or psychological thinking." Hence, he apparently denies to Ahrens the right to call himself a believer in the organic theory of the State. He "has undertaken," he says, to write such a theory; "but by the organism of the State, he does not so much understand a living and personal collective being, as an organic arrangement for community in law," or (as I suppose it is in the original) right.

"I made the mistake," he adds, "of presupposing some understanding for this science which I had made known in my *Theory of Parties*, but I found out I was in error, and that all psychological thinking about the State was strange and unknown to the education of the day. My *Studies* were put aside as 'the incomprehensible nonsense of an otherwise intelligent man.' The fruits of these studies, as they have been matured in the present work, are received with general acceptance" (*ib.*). The last is an astounding statement; and if true would argue almost as low a state of political science in Germany as exists in England; but in this the author probably flatters himself.

The work of Mr. Bluntschli is a valuable one, but this extravagant notion that the State is an organic being, or, in plain English, or at least in logical effect, an animal, has vitiated all his conclusions. In this respect Ahrens, and, though I am acquainted only at second hand with his works, I presume Krause, are safer guides.

(*g*) Aristotle himself recognized mixed constitutions. *Pol.*, iv, 7: "*Quartam quoddam genus reipublicæ maxime probandum esse censeo, quod est ex his, quæ prima dixi, moderatum et permixtum tribus.*" "*Cicero De Republ.*, i, 29 . . . . *Polybius* (vi, 11) had previously described the Roman constitution as mixed. Plato (*Laws*, 712) treated Sparta as a mixed government, but without using the phrase" (*Theory of the State*, p. 332, note). "If it is understood," continues the author, "that the supreme governing power is itself divided between the monarch, the aristocracy and the people, so that two supreme governments exist side by side, each independent of the other, then Tacitus is right in rejecting the idea of a mixed State, and in maintaining that its existence, or, at any rate, its continuance, is impossible" (*ib.*, 332, 333). *Tacitus' Annals*, iv, 33: "*Cunctas nationes et urbes populus, aut primores, aut singuli regunt: delecta ex iis et consociata reipublicæ forma laudari facilius quam evenire, vel si evenit, haud diuturna esse potest.*"

(*h*) *Theory of the State*, Bluntschli, p. 400, n.: "It is hardly necessary to remind English readers," says the translator, "that our constitution is a monarchy only in the popular, and not in the scientific sense."

(*i*) *Theory of the State*, pp. 329, 333: "It is generally forgotten," he says, in the paragraph last cited, "that the principle of Aristotle's division does not rest on the nature and composition of the *legislative* power; for in any advanced State this is usually representative of the chief elements of the whole nation. On the contrary, it depends on the antithesis between the government and the governed, and upon the question to whom the supreme administrative power belongs. This latter cannot be divided, not even between a king and his ministers, for this would create a dyarchy or triarchy, and would be opposed to the essential character of a State, which, as a living organism, requires unity. In all living beings there is a variety of powers and organs, but in this variety there is unity. Some organs are superior and others inferior, but there is always one supreme organ, in which the directing power is concentrated. The head and the body have no separate and independent life, but they are not equal. So also for the

State, a supreme organ is a necessary condition for its existence, and this cannot be split into parts, if the State itself is to retain its unity."

(*j*) "By a mixed State may be understood one in which monarchy, aristocracy, or democracy are moderated or limited by other political factors, *e. g.*, a monarchy may be limited by the formation of an aristocratic Senate or Upper House, and of a primary or representative Assembly of the people. In that case it is true that such a divided constitution is better than when an individual, or a few, or the majority rule absolutely and without restraint. But such a mixture as this does not create a new form of State, for the supreme governing power is still concentrated in the hands of the monarch, or of the aristocracy, or of the people."

(*k*) "As the Middle Ages came to an end," he says, "the modern constitution of the State was close at hand. It is the end of a history of more than a thousand years, the completion of the Roman-Germanic political life, the true political civilization of Europe.

"This form of State was first developed in England, where it had long been slowly but surely ripening." . . . .

"Constitutional monarchy is a combination of all other forms of State. It preserves the greatest variety without sacrificing the harmony and unity of the whole. While giving free room to the aristocracy to exercise its powers, it imposes no restraint upon the democratic tendencies of the people. In its reverence for the law we can even see an ideocratic element. But all these various tendencies are held together in their due relations by the monarchy, the living head of the State organism. . . . .

"The English king has realized that he does not represent his own will, but that of the State. Thus the ministers and—since the English ministers are kept in power by the confidence of Parliament, or rather of the House of Commons—the popular representatives have more influence over the government than in continental States. So far the English monarchy may be called parliamentary or republican. But the reverence for the crown is nowhere stronger than in England, and however strong the aristocratic elements, and the Parliament may be, the English constitution has remained a monarchy."

(*l*) *History of the Science of Politics*, p. 32, note: "We now say," observes the author cited, "that political power, as distinct from legal sovereignty, is in the last resort with the majority of the House of Commons."

(*m*) "In our country, for example, one component part of the sovereign or supreme body is the numerous body of the Commons (in the strict signification of the term): that is to say, such of the Commons (in the large acceptation of the term) as share the sovereignty with the king and peers, and elect the members of the Commons House." "Consequently the sovereignty always resides in the king and the peers, with the electoral body of the Commons" (*Jur.*, pp. 251–253).

(*n*) A full account of the Constitution of the Tribunate is given by Mr. Calhoun, in his *Disquisition on Government*" (pp. 94, *et seq.*), from which we extract the following:

"Such was the origin of the tribunate; which, in process of time, opened all the honors of the government to the plebeians. They acquired the right, not only of vetoing the passage of all laws, but also their execution; and thus obtained, through their tribunes, a negative on the entire action of the government, without divesting the patricians of their control over the Senate. By this arrangement, the government was placed under the concurrent and joint voice of the two orders, expressed through separate and appropriate organs; the one possessing the positive, the other the negative powers of the government. This simple change converted it from an absolute, into a constitutional government—from a government of the patricians only, to that of the whole Roman people—and from an aristocracy into a republic. In doing this it laid the solid foundation of Roman liberty and greatness.

"A superficial observer would pronounce a government, so organized as that one order

should have the power of making and executing the laws, and another, or the representatives of another, the unlimited authority of preventing their enactment and execution, if not wholly impracticable, at least too feeble to stand the shocks to which all governments are subject; and would, therefore, predict its speedy dissolution, after a distracted and inglorious career.

"How different from the result! Instead of distraction, it proved to be the bond of concord and harmony; instead of weakness, of unequaled strength, and, instead of a short and inglorious career, one of great length and immortal glory. It moderated the conflicts between the orders; harmonized their interests and blended them into one; substituted devotion to country in the place of devotion to particular orders; called forth the united strength and energy of the whole, in the hour of danger; raised to power the wise and patriotic; elevated the Roman name above all others; extended her authority and dominion over the greater part of the then known world, and transmitted the influence of her laws and institutions to the present day. Had the opposite counsel prevailed at this critical juncture; had an appeal been made to arms instead of to concession and compromise, Rome, instead of being what she afterwards became, would, in all probability, have been as inglorious, and as little known to posterity, as the insignificant States which surrounded her, whose names and existence would have been long since consigned to oblivion, had they not been preserved in the history of her conquests of them. But for the wise course then adopted, it is not improbable—whichever order might have prevailed—that she would have fallen under some cruel and petty tyrant, and finally been conquered by some of the neighboring States or by the Carthagenians or the Gauls. To the fortunate turn which events then took, she owed her unbounded sway and imperishable renown.

"It is true, that the tribunate, after raising her to a height of power and prosperity never before equaled, finally became one of the instruments by which her liberty was overthrown; but it was not until she became exposed to new dangers, growing out of increase of wealth and the great extent of her dominions, against which the tribunate furnished no guards. Its original object was the protection of the plebeians against oppression and abuse of power on the part of the patricians. This it thoroughly accomplished, but it had no power to protect the people of the numerous and wealthy conquered countries from being plundered by consuls and proconsuls. Nor could it prevent the plunderers from using the enormous wealth, which they extorted from the impoverished and ruined provinces, to corrupt and debase the people; nor arrest the formation of parties—irrespective of the old division of patricians and plebeians—having no other object than to obtain the control of the government for the purpose of plunder. Against these formidable evils, her constitution furnished no adequate security. Under their baneful influence, the possession of the government became the object of the most violent conflicts; not between patricians and plebeians, but between profligate and corrupt factions. They continued with increasing violence, until finally Rome sunk, as must every community under similar circumstances, beneath the strong grasp, the despotic rule of the chieftain of the successful party—the sad but only alternative which remained to prevent universal violence, confusion and anarchy."

In further illustration of the principle stated in the text the Slavic principle may be referred to, that requires unanimity to give validity to a political act. This is referred to by Mr. Bluntschli as practicable only in small and entirely homogeneous communities; but it is well known to have been exemplified on a large scale in the Polish government. I do not, of course, recommend the principle as applied in that government, but it worked fairly well for over two hundred years.

It is thus explained, and also a similar institution of another people, by Mr. Calhoun (*Disquisition on Government*):

"It is, then, a great error to suppose that the government of the concurrent majority is impracticable or that it rests on a feeble foundation. History furnishes many examples of such governments, and among them, one, in which the principle was carried to an extreme that would be thought impracticable had it never existed. I refer to that of Poland. In this it was carried to such an extreme that, in the election of her kings, the concurrence or acquiescence of every individual of the nobles and gentry present in an

assembly numbering usually from one hundred and fifty to two hundred thousand, was required to make a choice; this giving to each individual a veto on his election. So, likewise, every member of her Diet—the supreme legislative body—consisting of the king, the senate, bishops and deputies of the nobility and gentry of the palatinates, possessed a veto on all its proceedings, thus making an unanimous vote necessary to enact a law, or to adopt any measure whatever. And, as if to carry the principle to the utmost extent, the veto of a single member not only defeated the particular bill or measure in question, but prevented all others, passed during the session, from taking effect. Further, the principle could not be carried. It, in fact, made every individual of the nobility and gentry, a distinct element in the organism, or, to vary the expression, made him an *Estate of the kingdom*. And yet this government lasted, in this form, more than two centuries; embracing the period of Poland's greatest power and renown. Twice, during its existence, she protected Christendom, when in great danger, by defeating the Turks under the walls of Vienna and permanently arresting thereby the tide of their conquests westward.

"It is true her government was finally subverted and the people subjugated, in consequence of the extreme to which the principle was carried; not, however, because of its tendency to dissolution *from weakness*, but from the facility it afforded to powerful and unscrupulous neighbors to control, by their intrigues, the election of her kings. But the fact, that a government, in which the principle was carried to the utmost extreme, not only existed, but existed for so long a period, in great power and splendor, is proof conclusive both of its practicability and its compatibility with the power and permanency of government.

"Another example, not so striking indeed, but yet deserving notice, is furnished by the government of a portion of the aborigines of our own country. I refer to the Confederacy of the Six Nations, who inhabited what now is called the western portion of the State of New York. One chief delegate, chosen by each nation, associated with six others of his own selection—and making, in all, forty-two members—constituted their federal or general government. When met, they formed the council of the union, and discussed and decided all questions relating to the common welfare. As in the Polish Diet, each member possessed a veto on its decision, so that nothing could be done without the united consent of all. But this, instead of making the Confederacy weak or impracticable, had the opposite effect. It secured harmony in council and action, and with them a great increase of power. The Six Nations, in consequence, became the most powerful of all the Indian tribes within the limits of our country. They carried their conquest and authority far beyond the country they originally occupied."

(*o*) The essay of Bacon, "Of Innovations," which follows, is almost too familiar to be quoted, but the true principles of reform are nowhere so admirably and wisely expressed:

"Time is the greatest innovator, and if time of course alter things to the worse, and wisdom and counsel shall not alter them to the better, what shall be the end? It is true, that what is settled by custom, though it be not good, yet at least it is fit; and those things which have long gone together, are, as it were, confederate within themselves; whereas new things piece not so well; but, though they help by their utility, yet they trouble by their inconformity; besides, they are like strangers, more admired and less favored. All this is true, if time stood still: which contrariwise, moveth so round, that a froward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old times are but a scorn to the new. It were good, therefore, that men in their innovations would follow the example of time itself, which indeed innovateth greatly, but quietly, and by degrees scarce to be perceived; for otherwise whatsoever is new is unlooked for; and ever it mends some and pairs (injures or impairs) other; and he that is holpen, takes it for a fortune, and thanks the time; and he that is hurt, for a wrong, and imputeth it to the author. It is good also not to try experiments in States, except the necessity be urgent, or the utility evident; and well to beware that it be the reformation that draweth on the change, and not the desire of change that pretendeth the reformation; and lastly, that the novelty, though

it be not rejected, yet be held for a suspect, and, as the Scripture saith, 'That we make a stand upon the ancient way, and then look about us, and discover what is the straight and right way, and so to walk in it.'"

(*p*) Napoleon is reported to have said that all Europe must become either republican or Cossack; and, it is not unreasonable to expect—existing political tendencies remaining unchanged—that Europe, as well as Asia, will finally fall under the dominion of Russia; and thus the *idea* of the *world state*, entertained by some of the German jurists, be practically realized.

(*q*) The subject is ably and entertainingly treated by Mr. Fowler in *The City State.*